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Inconsistent Treatment: The Florida Court's Struggle with the Consistency Doctrine

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INCONSISTENT TREATMENT: THE FLORIDA COURTS STRUGGLE WITH THE CONSISTENCY DOCTRINE

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I. INTRODUCTION

On December 12, 1991, the Florida Fifth District Court of Appeals issued a landmark decision in *Snyder v. Board of County Commissioners of Brevard County*.[1] In *Snyder*, the court rewrote much of Florida law and dramatically expanded the courts' role in reviewing the application of zoning to particular parcels of land.[2] Specifically, the court concluded that (1) applications of rezonings and other zoning ordinances to particular parcels are not legislative actions requiring deferential review, but "quasi-judicial" actions which are reviewed for the existence of substantial competent evidence;[3] (2) landowners are constitutionally entitled to use their property, and therefore any restriction on those rights should be subject to close judicial scrutiny;[4] (3) local governments, in light of effective judicial review and due process concerns, are required to make written findings of fact and conclusions of law to support particular zoning restrictions;[5] and (4) although the burden is on a landowner to show that a petition for a particular permit or approval meets procedural requirements and is consistent with the general zoning or comprehensive plan, once that burden is met, the local government must show by clear and convincing evidence a specifically stated public purpose for denying the landowner the permission sought.[6] Although most of the *Snyder* court's holdings conflict with some longstanding Florida prec-

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1. 595 So. 2d 65 (Fla. 5th DCA 1991).
2. *Id.* at 80-82.
3. *Id.* at 80.
4. *Id.* at 80-81.
5. *Id.* at 81.
6. *Id.*

edent,[7] each was predictable, even inevitable, given past decisions construing Florida's statutory implementation of the consistency doctrine.

The consistency doctrine requires local governments "to engage in planning and carry out, implement, or effectuate plans through its official land use controls."[8] In Florida, the doctrine has existed officially since the adoption of the Local Government Comprehensive Planning Act (LGCPA),[9] and it was modernized in the 1985 overhaul of Chapter 163, the Local Government Comprehensive Planning and Land Development Regulation Act (Planning Act).[10] The Planning Act requires local governments to adopt and, through land development regulations, implement comprehensive plans which meet state and regional standards, and it prohibits local governments from undertaking or permitting development inconsistent with the comprehensive plan.[11]

Two types of concerns have driven the various aspects of the consistency doctrine as it has developed over time. The first concern involves the quality of planning and plan implementation.[12] This "macro" concern is characterized by arguments that consistency is necessary to demonstrate the relationship of zoning actions to the health, safety and welfare of the community.[13] The second concern involves, conversely, the treatment of individual property owners who are either discriminated against or receive unduly favorable consideration of their proposals.[14] This "micro" concern is characterized by

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7. *See, e.g.*, Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959) (rezonings are legislative acts); Smith v. City of Miami Beach, 213 So. 2d 281 (Fla. 3d DCA 1968) (burden is on landowner to show change in circumstances or that maintenance of existing zoning is arbitrary or unreasonable; zoning ordinance is to be sustained where validity is fairly debatable). *See also* 1 JULIAN JURGENSMEYER AND JAMES WADLEY, FLORIDA LAND USE RESTRICTIONS 21 (1991) (land use regulations presumed valid).

8. JOSEPH DIMENTO, THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING 2 (1980).

9. Ch. 75-257, 1975 Fla. Laws 794 (current version at FLA. STAT. § 163.2301 (1991)). This vestigial consistency requirement, which remains part of the current law, provides that:

> [I]t is the intent of this act that adopted comprehensive plans . . . shall be implemented, in part, by the adoption and enforcement of appropriate local regulations on the development of lands . . . [and that] the adoption and enforcement by a governing body of regulations for the development of land . . . shall be based on, be related to, and be a means of implementation for an adopted comprehensive plan . . . .

10. Ch. Law 85-55, 1985 Fla. Laws 207 (current version at FLA. STAT. § 163.3161 (1991)), replacing most of the previous planning provisions.

11. FLA. STAT. § 163.3201 (1991).

12. This article uses "macro" to refer to these community concerns. The discussion of the Planning Act in Part IV reveals that much of Florida's statutory framework is designed to ensure that macro concerns are addressed.

13. *See infra* notes 39-45, 55-60 and accompanying text.

14. This article uses the term "micro" to describe these concerns regarding individual

arguments that consistency ought to be required as a means of avoiding arbitrary actions.[15] Although these concerns are often interrelated, policies necessary to address one do not necessarily address the other, and confusion in the courts as to which concern is being addressed often results.

The attempt to implement consistency in Florida ironically has led to inconsistent holdings in the courts reviewing rezoning cases.[16] The courts have split on each of the following issues: whether local government rezonings retain their legislative character or become "quasi-judicial" acts;[17] whether local governments are required to produce a written record at rezoning hearings;[18] whether consistency is to be determined by a "fairly debatable" or a "strict scrutiny" standard;[19]

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rights. As is revealed in Part IV, micro concerns are addressed under the Planning Act through the provision of a statutory right to challenge rezonings and other development orders in the circuit court under section 163.3215, *Florida Statutes* (1991).

15. *See infra* notes 74-80 and accompanying text.

16. As will be seen, rezoning (or in areas currently without zoning, the adoption of the first zoning map) creates particular problems because such actions always have been given deference as legislative acts, as opposed to zoning actions such as special exceptions and variances which always have been considered executive acts. Historically, both the establishment of the zoning categories and the application of the categories to parcels (by way of adopting or amending a zoning map) have been considered legislative acts. See Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959), where the court held that the denial of a map amendment intended to allow multi-family structures was a legislative act, due the same deference as the initial adoption of the zoning ordinance. "It is obvious to us that the enactment of the original zoning ordinance was a legislative function and we cannot reason that the amendment of it was of different character." *Id.* at 839.

The continuing vitality of this doctrine, and what should replace it if it is to be discarded, is in large part the substance of the dispute among the district courts of appeal.

17. *Compare* Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991) (rezonings are quasi-judicial), *rehearing denied*, March 20, 1992 (unpublished) *with* Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991) (rezonings are legislative acts). The difference is important for determining the procedural protection due a petitioner.

18. *Compare* Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1989) (while rezonings are legislative, in reviewing validity courts rely on a verbatim record) *with* Hirt v. Polk County Board of County Comm'rs, 578 So. 2d 415 (Fla. 2d DCA 1991) (holding that procedures used by a County affect review, implying County authority to determine whether verbatim record shall be made). Nothing in Florida statutory law requires rezonings to be made on a verbatim record, though notice and hearing requirements for rezonings are imposed on counties by section 125.66(5), and on cities by section 166.041(3)(c), *Florida Statutes* (1991).

19. *Compare Snyder*, 595 So. 2d 65 (strict scrutiny applies to all consistency reviews), *rehearing denied*, March 20, 1992 (unpublished) *with* Southwest Ranches Homeowners Ass'n. v. Broward County, 502 So. 2d 931 (Fla. 4th DCA 1987), *review denied*, 511 So. 2d 999 (Fla. 1987) (fairly debatable standard applies if density less than plan density). This article argues that because the consistency requirement is statutory, and because statutory definitions of consistency are provided, the proper approach is to apply principles of statutory review rather than "fairly debatable" or "strict scrutiny" standards. *See infra* notes 177, 323 and accompanying text.

who carries the burden of proof;[20] and whether a rezoning application consistent with the plan must be approved.[21] These issues are vital to the implementation of consistency, and there is currently no uniformity between the district courts of appeal on the proper interpretation of the consistency doctrine.

The *Snyder* decision is the most recent example of the wide range of interpretations given the consistency doctrine by the Florida courts. Although none of the *Snyder* holdings represent a radical departure from holdings of other district courts,[22] the logic of the decision errs in several important respects. For example, in finding that rezonings are quasi-judicial in nature, the court relied on doctrines and precedents which were developed outside Florida and outside the context of examining the exercise of local authority.[23] More importantly, in its common law and constitutional approach to analyzing the issue before it, the court ignored the exclusive statutory framework established by the Legislature to deal with precisely that problem.[24]

This article argues that the decisions of local governments in rezoning activities should be treated as legislative acts rather than quasi-judicial acts unless the Legislature acts to reclassify them, or unless they are treated as quasi-judicial under the local government's own procedures.[25] Further, this article urges that, while a written record should be used if available, a consistency review is properly an original action under Florida law.[26] In addition, this article contends that

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20. *Compare Snyder* 595 So. 2d 65 (burden is on landowner to establish that procedures have been met and plan consistent) *with* B.B. McCormick & Sons v. City of Jacksonville, 559 So. 2d 252 (Fla. 1st DCA 1990) (requiring careful scrutiny of local government's rationale and evidence, thereby placing burden on local government).

21. *Compare Snyder*, 595 So. 2d 65 (if landowner demonstrates consistency with comprehensive plan, rezoning must be approved unless local government shows clear and convincing evidence that public necessity requires lesser use) *with* Dade County v. Inversiones Refamar, 360 So. 2d 1130 (Fla. 3d DCA 1978) (where plan provides range of densities, local government has discretion to apply lower end of range to a property).

22. For example, the Third District required local governments to create a verbatim record for review in *Machado v. Musgrove*, 519 So. 2d 629 (Fla. 3d DCA 1987), and the Second District treated rezonings as quasi-judicial in Kuehnel v. Manatee County, 538 So. 2d 52 (Fla. 3d DCA), *opinion replaced on rehearing*, 542 So. 2d 1356 (Fla. 3d DCA) (holding appellate review by circuit court proper), *review denied*, 548 So. 2d 663 (Fla. 1989). For a discussion of *Kuehnel*, see *infra* note 239-42 and accompanying text.

23. See Part III for a discussion of the history of applying the "quasi-judicial" label on rezonings. This article maintains that the home rule philosophy of Florida, as well as existing case law approaches, argues against judicial recharacterization of rezonings as quasi-judicial. *See infra* notes 335-37 and accompanying text.

24. *See infra* notes 303-03 and accompanying text.

25. This article argues that certiorari appeal of legislative rezonings in the circuit or county courts is invalid under Florida law, illegal where it is currently practiced, and simply bad policy. *See infra* notes 307-10 and accompanying text.

26. See *infra* notes 268-70 and accompanying text.

the burden of proof in consistency challenges should be on the challenger, who must demonstrate that the local government decision approving or denying a rezoning was inconsistent with the local comprehensive plan.[27] Finally, this article argues that, while the *Snyder* court is correct in holding that property owners should be granted a requested rezoning unless the request is inconsistent with the plan, such a result also may be reached under the terms of the Growth Management Act, statutory interpretation, and good planning policy, obviating the need to resort to constitutional arguments.[28]

The consistency doctrine has a history in legal literature dating back at least twenty years prior to its initial incorporation in the 1975 LGCPA. An examination of the history of the consistency doctrine, identifying ideas and problems which informed the development of Florida's statutory language, comprises Part II of the article. In Part III, the literature and case law which has attacked the traditional view that rezonings are legislative acts, along with their relationship to the consistency doctrine, is discussed. In Part IV, the statutory language which established Florida's consistency doctrine is reviewed and a preliminary assessment is made regarding the effect that language should be given by the courts. Part V analyzes Florida case law, describing the various ways the Florida courts have treated the consistency requirement and the standards used in reviewing zoning decisions, concluding with a closer analysis of the *Snyder* decision. Finally, Part VI of the article offers principles which might be employed to restore consistency to Florida's implementation of the consistency doctrine.

II. History of the Consistency Doctrine

A brief history of the consistency doctrine provides insight into the structure of the Local Government Comprehensive Planning and Land Development Regulation Act (Planning Act)[29] and partially explains the difficulties which the courts have had in implementing it. Zoning became part of the national landscape in 1926 when the United States Department of Commerce published the model Standard Zoning Enabling Act (Enabling Act).[30] Under the Enabling Act, cities would be delegated the power to regulate land use, including the type of use, intensity of use, and "height and bulk" of buildings.[31] In 1926, zoning truly was established as a municipal power when it was

27. See *infra* notes 271-73 and accompanying text.
28. See *infra* notes 274-76 and accompanying text.
29. Fla. Stat. §§ 163.3161-.3215 (1991).
30. Standard City Planning Enabling Act (U.S. Dept. of Commerce 1928).
31. *See, e.g.*, Fla. Stat. § 176.02 (1971).

upheld against due process and takings clause challenges in *Village of Euclid v. Ambler Realty Co.*[32] Addressing the due process issue, the *Euclid* Court held that zoning was not inherently arbitrary, and that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[33] The Court thereby established zoning as a legislative act, giving it more deference than most Congressional enactments at the time. Indeed, the "fairly debatable" standard, along with the limited substantive requirement that the zoning restrictions not be arbitrary or capricious and bear a "substantial relationship to the public health, safety, morals or general welfare,"[34] arguably was the pattern for the Court's turnaround from the *Lochner*[35] era of substantive due process jurisprudence.[36]

Given the Court's imprimatur as a method of preventing apartments from intruding into single family neighborhoods—the Court compared these intrusions to having a pig in the parlor[37]—zoning swept the country. Subsequently, most states adopted some version of the Enabling Act. Florida followed the trend, adopting its first zoning enabling act in 1939.[38]

The first serious academic critique of zoning as it had come to be practiced was undertaken by Charles M. Haar in 1955.[39] Examining the statutory language of the Enabling Act, which required that zoning be "in accordance with a comprehensive plan,"[40] Professor Haar analyzed the failure of communities to adopt their zoning systems after the compilation of a comprehensive plan.[41] Haar criticized the

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32. 272 U.S. 365 (1926).

33. *Id.* at 388.

34. *Id.* at 395.

35. In Lochner v. New York, 198 U.S. 45 (1905), the United States Supreme Court overturned a limitation on the working hours of bakers as violative of due process. The Court's attack on economic and social legislation continued until 1937, when the Court expressly abandoned its strict review in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). For a discussion of the change in economic substantive due process jurisprudence, see GEOFFREY STONE ET AL., CONSTITUTIONAL LAW, 786-814 (2d ed. 1991).

36. The decision itself, however, was well grounded in the Lochnerian philosophy. *See* Robert Williams, Jr., *Euclid's Lochnerian Legacy*, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 278 (Charles M. Haar & Jerold S. Kayden eds., 1989).

37. 272 U.S. at 388 ("a right thing in a wrong place").

38. Ch. 19359, Laws of Fla. (1939), *superseded by* ch. 71-176, 1971 Fla. Laws 1093, *repealed by* ch. 73-129, 1973 Fla. Laws 238. The intent of the repeal was to recognize the authority of municipalities to regulate under their constitutional home rule powers. Ch. 73-129, § 1, 1973 Fla. Laws 238, 239 (to be codified at FLA. STAT. § 166.021(3)).

39. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

40. *See supra* note 30 and accompanying text.

41. *Id.* at 1157-58.

courts for interpreting the "comprehensive plan" reqirement to mean only that the zoning ordinance should be uniform and broad in scope,[42] and called for the implementation of a master comprehensive plan.[43] He proposed that such a plan be designed to meet the statutory requirements of the Enabling Act rather than the muster of a constitutional analysis.[44]

Haar's primary contention was that zoning without planning constitutes an invalid exercise of the delegated authority to zone.[45] In his conclusion, however, Haar noted that

> [i]t might even be argued that any zoning done before a formal master plan has been considered and promulgated is per se unreasonable, because of failure to consider as a whole the complex relationships between the various controls which a municipality may seek to exercise over its inhabitants in furtherance of the general welfare.[46]

While Haar's work centered around the specific requirements of the Enabling Act, he developed the general concept that a comprehensive plan, rather than the zoning ordinance itself, is the proper reference point from which to review zoning ordinances.[47]

Eleven years after Haar's critique, a more populist assault on zoning practice surfaced in *The Zoning Game*, in which author Richard Babcock declared that zoning had become "trial by neighborism."[48] Babcock decried the lax standard of review afforded zoning decisions, which allowed even the most biased, prejudiced, and exclusionary zoning decisions to be upheld on the flimsiest of reasons.[49] The problem, according to Babcock, is "that the *criteria* for decision-making are exclusively local, even when the interests affected are far more comprehensive."[50] Babcock called for procedural reforms, as well as greater planning requirements.

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42. *Id.* at 1157. Haar laid the blame at the feet of the state legislatures for failing to make the planning requirement explicit. *Id.*

43. *Id.* at 1158. Haar supported planning as a remedy for overall arbitrariness, noting that "[t]he more clarity and specificity required in articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts be able to review the regulation." *Id.*

44. *Id.* at 1159.

45. *Id.*

46. *Id.* at 1174.

47. *See, e.g.*, Machado v. Musgrove, 519 So. 2d 629, 631 (Fla. 3d DCA 1987).

48. RICHARD BABCOCK, THE ZONING GAME 141 (1966).

49. *Id.* at 159. "The cloak for arbitrary decision-making is the absence of any command to follow uniform practice, to explain, and to make a record." *Id.*

50. *Id.* at 153.

In the area of procedure, Babcock argued for a statutory revision of the Enabling Act which would require zoning decisions to be made in accordance with published rules, considering testimonial evidence given under oath and subject to cross-examination.[51] Additionally, he emphasized the use of a written record and written findings of fact.[52] Furthermore, Babcock called for the creation of a state administrative agency charged with ensuring that local governments conformed with the new mandates.[53] Babcock's views, particularly in the area of procedure, have become a focal point for discussions of zoning reform.[54]

A decade later, in a seminal law review article, Daniel Mandelker revisited the role of the comprehensive plan as an antecedent to legitimate zoning.[55] He first dismissed the notion that the "comprehensive plan" required by the Enabling Act was a "master plan" as conceived by planners.[56] Mandelker pointed out that the Standard Zoning Enabling Act preceded the Standard Planning Enabling Act by several years, and that the preparation of a master plan was optional under the Standard Planning Act.[57] He then described the failure of the Standard Planning Act to require comprehensive planning as a "serious shortcoming" in policy, as serious as the failure to require zoning to be consistent with the comprehensive plan.[58]

Mandelker offered several reasons for mandating planning. First, new types of discretionary zoning were being developed, and the new concerns of "growth management" and environmental protection were emerging.[59] Further, the federal government was mandating plans in conjunction with urban renewal and mass transportation grants.[60] Finally, the courts were beginning to view planning as a support or prerequisite for zoning decisions.[61] Mandelker called for amendments to zoning enabling legislation that would mandate planning and set forth specific requirements for environmental, growth management, and low income housing elements.[62]

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51. *Id.* at 157-58.
52. *Id.*
53. *Id.* at 159-85.
54. *E.g.*, Holman, *infra* note 107 (citing Babcock and suggesting judicial adoption of similar procedural reforms).
55. Daniel Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976).
56. *Id.* at 901.
57. *Id.* at 902.
58. *Id.* at 909-10.
59. *Id.* at 909-18.
60. *Id.* at 921.
61. *Id.* at 931.
62. *Id.* at 952.

Similarly, after reviewing the steps taken by courts and legislatures in several states, including Florida,[63] toward requiring that local land regulatory activities be consistent with previously adopted comprehensive plans, Mandelker called for state legislation mandating consistency between the comprehensive plan and "the entire zoning and land use control process."[64] Mandelker also identified and addressed the need for an effective definition of consistency, and focused particularly on the need for both spatial and temporal application of consistency.[65] Finally, Mandelker called for a framework of state and regional review of local plans to ensure that issues of extra-local concern were adequately addressed[66] and local plans were consistent with plans made by appropriate state and regional authorities.[67] Mandelker's views have now been largely incorporated into Florida's consistency framework.

In 1980, only four years after the publication of Mandelker's article, Joseph DiMento conducted a review of the claims made by proponents and opponents of the consistency doctrines and compared them to the experiences of several states. He focused on whether planning could be effective enough to justify a requirement that more immediate activities be consistent with the plan.[68] DiMento concluded that neither side in the debate over the desirability of consistency had won: while the claims of consistency opponents were unsubstantiated, prob-

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63. In discussing Florida's framework, newly adopted in 1975, Mandelker notes the similarity between its provisions and those of the ALI-ABA MODEL LAND DEVELOPMENT CODE (1975). *Id.* at 961. Mandelker approved of the "far reaching" structure of the statute, which applied consistency to development orders. *Id.*

64. *Id.* at 965. It is interesting to note that before Mandelker wrote this article, the *Fasano* decision instituted consistency in Oregon. Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973); *see infra* text accompanying note 116. While Mandelker discussed Oregon and other states whose courts had used consistency with the comprehensive plan as a basis for review, his call for reform was pointed at the legislatures rather than the courts. Mandelker, *supra* note 55 at 967.

65. *Id.*

66. *Id.* at 915-16. Mandelker criticized the laxness of the provisions for state review laid out in both Florida's 1975 LGCPA and the ALI-ABA MODEL DEVELOPMENT CODE, calling them "distressingly short of administrative review" and "a weak compromise." *Id.* at 967. Interestingly, the MODEL DEVELOPMENT CODE took the position that state review should be minimal to encourage local governments to adopt comprehensive plans, which were optional. Florida did not need this incentive, as it had mandated planning in the 1975 LGCPA. FLA. STAT. § 163.3167 (1975). Mandelker's criticisms were perhaps prophetic: one of the major reforms in the 1985 Planning Act was to institute a regime of significant state and regional review and approval of local comprehensive plans. FLA. STAT. § 163.3184 (1991); *see also* Thomas Pelham et al., *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U.L. REV. 515, 541-53 (1985).

67. Mandelker, *supra* note 55, at 923.

68. DIMENTO, *supra* note 8, at 106-07.

lems in the establishment of effective planning programs remained, particularly problems with resources.[69]

In a concluding chapter, DiMento offered advice to consistency advocates, including the recommendation that a clear definition of consistency be established.[70] In addressing the ways in which consistency could be defined, DiMento posed the following questions:

> To what kinds of local action does the consistency requirement apply? Is it limited to major policy plans and broadly influential regulatory devices, such as overall zoning schemes? Or does it encompass the gamut of land use regulatory devices—zoning amendments and variances, conditional use permits, subdivision controls, administrative zoning processes, and so forth? Must each step in the development chain be addressed for consistency?
>
> Are map designations or policies the touchstones of the consistency analysis? A decision will allow local planners and policymakers to create planning tools that are appropriately detailed and precise. It forces a community to be clear on whether it promotes overall flexibility in the use designations or whether it attempts to make spatial determinations stringent development constraints.
>
> How is implementation of consistency to be phased? Will the state promote and finance an intensive single effort at comprehensive planning? Is the traditional "holding pattern" assumption of low intensity zoning to be followed? Or is consistency law prospective only?
>
> What remedies are available to effect consistency? Which of these are applicable in situations where a plan has not yet been adopted? What means of enforcement will be used?
>
> What function does internal consistency have in determining the availability of amendments to the plan? Is it a major dimension of plan adequacy? When is it to be considered?[71]

Florida addressed most of these questions when the Planning Act was adopted, as a review of the statute in Part IV of this article reveals.[72]

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69. *Id.* at 107-08.

70. *Id.* at 110-11.

71. *Id.* at 133.

72. For example, Florida answered the first question by applying consistency to all development orders and regulations under section 163.3194; the issue of internal consistency is addressed in rule 9J-5.005(5) of the *Florida Administrative Code.*

Professor DiMento addressed the Planning Act specifically in a 1985 article which is interesting but difficult to read because it is posed as a counterfactual, that is, as an analysis undertaken by a person seeking to subvert the proper implementation of the Planning Act. Joseph DiMento, *Florida's Growth Management Act of 1985: Coping with Consistency, in* PERSPECTIVES ON FLOR-

A later review of the relationship between planning and land use regulation came from land use lawyer Charles Siemon.[73] Siemon directed his call for reform at the courts, rather than the legislature. Siemon contended that

> the real culprit in the quagmire of modern land use regulatory law is the "anything goes" standard of judicial review behind which local governments that do not adhere to the minimal constraints of the Constitution can hide, a standard that poses a perplexing paradox.
>
> The paradox is that zoning without planning lacks coherence; nevertheless a challenged regulation is presumed valid and is generally tested, not on the strength of the planning program on which it was based, but on the basis of "post hoc rationalizations," what one court called "after the fact justifications."[74]

Reviewing the history of deferential review, Siemon identified two aspects of judicial review that create the paradox: the presumption of validity given land use regulations and the "extraordinary" burden placed on challengers.[75] Siemon found the presumption of validity particularly problematic because "it contradicts a fundamental judicial response to another due process issue—definiteness of standards and the delegation doctrine."[76] In Siemon's view, planning relates to the definiteness of standards in land use regulation in the same way that a sufficient legislative policy statement protects administrative action; each establishes a baseline policy that courts can use to establish whether a specific action is arbitrary, capricious, or not related to public health, safety, or welfare.[77] Siemon then offered the following approach for evaluating the due process of zoning regulations:

IDA'S GROWTH MANAGEMENT ACT OF 1985 57 (John DeGrove & Julian Jurgensmeyer eds. 1986). To defeat consistency, DiMento suggests its definition should result from compromises among interest groups, *id.* at 59; different definitions of consistency should be used for different types of review, *id.* at 58; and application of consistency between local plans and development orders should be discretionary with local governments rather than the result of careful judicial review. *Id.* at 61. DiMento clearly desires consistency to succeed and is pointing out where the doctrine could be muddled by incautious decisions.

73. Charles Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603 (1987).

74. *Id.* at 605-06 (citations omitted).

75. *Id.* at 607.

76. *Id.* at 618.

77. *Id.* at 627. Siemon writes that

> [t]he relationship between land use and the public health, safety, and welfare is the essence of planning, and the compilation of data and the analysis inherent in competent planning will inevitably impart accuracy and consistency to individual land use decisions.

Id.

> If a regulatory action is challenged as violative of substantive due process, the court must first determine whether the challenged action is taken in the context of a rational and meaningful planning program. If the action has been taken in the context of such a program, then the safeguard of meaningful and comprehensive deliberations, including the application of abstract policy to specific factual circumstances, justifies a presumption of validity. On the other hand, if the decision can be shown to have been made without benefit of a rational and meaningful planning program, then the court should be . . . suspicious of the challenged action and look far more closely at the justifications that are offered.[78]

Under Siemon's approach to due process, therefore, the courts would no longer look at rezonings or other regulatory acts as individual legislative actions. Instead, the courts would see such actions as part of a mosaic designed by the comprehensive plan. Actions taken outside the context of a comprehensive plan would be subject to a heightened degree of scrutiny simply because such scrutiny is necessary to determine whether, as Haar suggested,[79] they are per se arbitrary or not.

Siemon's phrase, "context of a . . . planning program,"[80] thus embraces a broad concept of consistency, as Siemon believes that if a specific decision is made without regard to the established policies of the plan, "the arbitrariness of the action will be discernable to the courts."[81] Through this process of scrutiny, Siemon hopes to return zoning actions to their proper place in the broader context of legislative action. This basis of review requires neither statutory action nor recasting zoning decisions as other than legislative acts, but merely a new tack to be taken by the courts.

Overall, the views of the commentators discussed above may be broadly categorized according to the subject of their concerns. The analyses of Haar, Mandelker, and DiMento address the "macro" issues associated with the consistency doctrine. They are concerned with making zoning legitimate on a policy level. Babcock and Siemon are concerned with the "micro" issues: the treatment of individual property owners and the kinds of protection provided by a scheme in which comprehensive plans are used to evaluate individual decisions. Their approaches to consistency, however, do not reveal this difference. Under the reforms promoted by Haar, Babcock, and Man-

78. *Id.* at 639.
79. *See* Haar, *supra* note 39 and accompanying text.
80. *See* Siemon, *supra* note 73, at 639.
81. *Id.* at 628.

delker, the consistency issue is attached to the authority given local governments under zoning enabling acts. Failure to adopt or follow a comprehensive plan would result in the local government's action being characterized as beyond its authority[82] rather than unconstitutional. While Haar and Mandelker note the possible due process problems resulting from the failure to comply with a comprehensive plan, only Siemon calls for an explicit modification of due process standards of review. None of the authors view the consistency doctrine itself as requiring zoning to be characterized as other than legislative action, though Babcock and Mandelker call for statutory reformation of the process used in reaching zoning decisions.

III. THE CONSISTENCY DOCTRINE, THE NATURE OF REZONINGS, AND THE STANDARD OF REVIEW

The development of the consistency debate brought with it a second area of inquiry: whether the application of zone districts to particular parcels, particularly in the case of a rezoning petition, was truly legislative action. The *Snyder* decision follows the reasoning developed under this line of inquiry, stating that such acts are "quasi-judicial," rather than legislative, in nature.[83] It is therefore useful to explore the history of this concept and and its impact on local governments and reviewing courts.

A. Quasi-judicial Decisionmaking in Florida

The concept of quasi-judicial decisionmaking has a long history in Florida, dating back at least to 1957, when the Florida Supreme Court decided the landmark case of *DeGroot v. Sheffield*.[84] *DeGroot* involved an appeal of a School Board's action in firing an employee despite a recommendation from a civil service board that the employee be retained. The issues, at least in part, were whether the School Board's decision was an executive decision, subject to collateral attack but limited in scope as to the power of the Board to fire, and whether the Civil Service Board's finding was subject to judicial

82. Until the rise of "home rule" approaches to municipal powers, city governments only had authority explicitly granted to them by their charters. Under "Dillon's Rule," which Florida followed until the constitution was amended in 1968, "the powers of a municipality are to be interpreted and construed in reference to the purposes of the municipality and if reasonable doubt should arise to whether the municipality possesses a specific power, such doubt will be resolved against the city." City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 803 (Fla. 1972). In non-home rule states this remains the case.

83. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991).

84. 95 So. 2d 912 (Fla. 1957).

review for the competence and sufficiency of the evidence before it.[85]

In finding that the School Board acted without proper authority, the court distinguished executive action from reviewable quasi-judicial action on the basis of the Civil Service Board's procedural requirements. "[W]hen notice and a hearing are required, and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive."[86]

Determining that the Civil Service Board's action was subject to such limitations, the court held that the action was subject to appellate review, not an original action for mandamus or equitable injunctive relief.[87] In addition, because no appeal by right existed, the court maintained that the appeal should be a certiorari appeal, with the scope of review limited to the record made before the Civil Service Board.[88] The purpose of review would be limited to determining "whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law."[89]

DeGroot therefore stands for the proposition that when executive action is contingent on fact finding held at a public hearing, the proceeding is quasi-judicial rather than executive, and subject to review in an appellate hearing.[90] The doctrine of quasi-judicial action thus anticipated the type of administrative review available for executive agency actions under Florida's Administrative Procedures Act (APA).[91] Also, because the APA prescribes a process of hearing officer review followed by final agency action and review by the district courts of appeal,[92] certiorari appeal is necessary only in circumstances where executive agencies *not* subject to the APA make quasi-judicial decisions.[93]

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85. *Id.* at 913-14.

86. *Id.* at 915.

87. *Id.*

88. *Id.* at 916.

89. *Id.*

90. David LaCroix, *The Applicability of Certiorari Review to Decisions on Rezoning*, 65 FLA. BAR. J. 105, 107 (June 1991).

91. FLA. STAT. §§ 120.50-.73 (1991).

92. FLA. STAT. § 120.57 (1991). *See also* FLA. CONST. art. III, § 4, for authority of district courts of appeal to review administrative decisions.

93. *See, e.g.*, Cherokee Crushed Stone v. City of Miramar, 421 So. 2d 684 (Fla. 4th DCA 1982) (holding that administrative act by City Commission was not covered by APA and that standing to appeal municipal ordinances by writ of certiorari cannot be granted by ordinance; constitutional certiorari is available because action was administrative in nature). Rule 9.030(c)(1), Fla. R. Civ. P., allows the circuit courts to take appeals of administrative action

Several types of activities associated with zoning regulations have been determined to be quasi-judicial.[94] For example, special exceptions, which are uses that may be allowed in particular zone districts upon a showing that the proposed use meets enumerated criteria,[95] have been held to be administrative in nature even when approved by the governing board. Under the Standard Zoning Enabling Act and most of its derivatives, the granting of special exceptions were administrative acts which could be delegated to boards of adjustment, zoning commissions, or an administrator.[96] As an administrative action, the discretion involved is narrow, and if an application for a special exception meets the enumerated criteria, it must be approved.[97] Also, in *City of Miami Beach v. Mr. Samuel's, Inc.*,[98] the Florida Supreme Court recognized that discretion to deny a special exception, even by the City Commission, was dependent on making findings on the criteria in the ordinance and held that appeal by certiorari was the appropriate remedy if abuses occurred.[99]

Variances also have been held to be administrative acts which are quasi-judicial if decided after notice and a hearing.[100] Variances, which entail limited exemptions from the lot size, setbacks, or other technical requirements of a zone district, were created under the Standard Zoning Enabling Act.[101] Intended to alleviate hardships that might otherwise result in takings or other arbitrary results,[102] variances were administered by Boards of Adjustment or similar bodies.

Finally, Florida's municipal zoning enabling act[103] created other quasi-judicial actors. It provided for a Board of Adjustment to which

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when provided by law, while 9.030(c)(3) gives circuit courts jurisdiction to issue common law writs of certiorari. For a discussion of the issues surrounding certiorari review of rezonings, see Part VI-A-5.

94. *See, e.g.*, Jennings v. Dade County, 589 So. 2d 1337, 1349 (Fla. 3d DCA 1991) (Ferguson, J., concurring) ("It is . . . well settled in this state that the granting of variances, and also special exceptions or permits, are quasi-judicial actions.") (citations and footnotes omitted).

95. *See* DANIEL MANDELKER, LAND USE LAW § 6.49 (1988 & Supp. 1991).

96. *Id.* § 6.51. Florida once had statutory guidelines for the use of special exceptions, but these were repealed by the 1985 Planning Act. See JULIAN JURGENSMEYER & JAMES WADLEY, ZONING EXECUTION OF POWERS; RELIEF AND APPEALS §§ 7-9 (1980) for a discussion of these provisions and their interpretation.

97. *See* MANDELKER, *supra* note 95, § 6.53; *see also* NORMAN WILLIAMS, 5 AMERICAN LAND PLANNING LAW § 148.05 (1985 & Supp. 1991).

98. 351 So. 2d 720 (Fla. 1977).

99. *Id.* at 722.

100. *See, e.g.*, National Advertising Co. v. Broward County, 491 So. 2d 1262 (Fla. 4th DCA 1986) (variance granted by Board of Adjustment reviewable by certiorari).

101. *See* MANDELKER, *supra* note 95, § 6.35-8.

102. *Id.* § 6.40-.43; *see also* JURGENSMEYER & WADLEY, *supra* note 91, § 7.

103. Chapter 176, FLA. STAT. (1971).

appeals from the actions of zoning administrators could be taken.[104] Furthermore, the statute provided that appeal from the decisions of the Board of Adjustment was by writ of certiorari to the circuit court.[105]

In sum, special exceptions, variances, and actions by the Boards of Adjustment all involve zoning activities related to the use of property under the zone district designations already applied to the property. The activities are characterized by limited discretion and an obligation to act in a particular way given certain facts. Their function is to assist in the execution of the zoning ordinance rather than in defining it, and so they are properly associated with the type of administrative action which could be termed quasi-judicial under *DeGroot*. By the early 1970's the distinction between these activities and the rezoning of land were well established in Florida law.[106] Elsewhere, however, an assault on the idea that rezonings are legislative was gathering; an assault which would later find its way into Florida.

B. Rezonings as Quasi-Judicial Proceedings

A line of case law which culminated in the *Snyder* decision had its genesis in a 1972 comment in the *Ohio State Law Review*.[107] In this comment, author Michael Holman argued that the status of rezoning decisions should be reconsidered, offering the "micro" type argument that "because of the procedural informality and limited judicial review which accompany legislative action, the presence of impropriety looms large, and individual rights are often sacrificed either on the altar of public opinion or ex parte over a lunch at the club."[108] Describing the difference between legislative and administrative or executive action as the difference between making law and executing preexisting law,[109] Holman offered the distinctions between legislative and judicial actions:

> First, judicial action is narrow in scope, focusing on specific individuals or on specific situations, while legislative action is open ended, affecting a broad class of individuals or situations. . . .

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104. FLA. STAT. §§ 176.08-.15 (1971).

105. *Id.* §§ 176.16-.19.

106. *Compare* Anon v. City of Coral Gables, 336 So. 2d 420 (Fla. 3d DCA 1976) (on appeal by certiorari from a review of a variance denial by certiorari, court required that variance be granted because landowner had met the ordinance's requirements) *with* Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959) (holding that map amendments are legislative).

107. Michael Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

108. *Id.* at 132.

109. *Id.* at 133.

> Secondly, legislative action results in the formation of a general rule or policy, while judicial action results in the application of a general rule or policy. . . .
>
> Thirdly, it is generally stated that judicial action is retrospective, determining "[t]he rights and duties of parties under existing law and with relation to existing facts." By contrast, legislative action is said to be prospective, determining "[w]hat the law shall be in future cases. . . ."
>
> Lastly, it has been held that the test for judicial action is whether it is the result of judgment or discretion. This standard is rejected as unsound because . . . [l]egislative and executive action require judgment just as much as judicial action.[110]

Holman then offered the following test to differentiate legislative from judicial activity:

> Does the action formulate a general rule or policy which is applicable to an open class of persons, interests or situations, or does the action apply a general rule or policy to specific persons, interests, or situations? If the answer is yes to the latter half of the question, then legislative action is present. If the answer is yes to the first half of the question, then there is judicial action.[111]

Holman went on to argue that the determination of whether a zoning amendment is the product of legislative action or judicial/quasi-judicial action should be based on his proposed test.[112] Finding that judicial or quasi-judicial action was involved would mean that "additional procedural requirements must be adhered to in the name of due process."[113] Though Holman did not specify the safeguards which would be required, he contended that if an impartial tribunal, notice and opportunity to be heard, a limit on the relevance of presentations, and a record with findings of fact were required, heightened judicial

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110. *Id.* at 135-36 (citations omitted). This passage became a focal point for the cases and articles cited in the rest of this section.

111. *Id.* at 136, n.59.

112. *Id.* at 137. The author maintained that the distinction between judicial and quasi-judicial action was unimportant for the purposes of the article. *Id.* at 130 n.3. This position, however, avoids the troublesome problem arising under cases like *DeGroot*, that quasi-judicial acts are predicated on executive, not judicial powers. In Florida, administrative adjudication is strictly limited in its power. *See* Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Mobile Home Park, Inc., 511 So. 2d 962 (Fla. 1987) (holding that local administrative board's powers do not include the imposition of common law damages); *see also* FLA. STAT. § 120.69 (1991) (providing that enforcement of agency action is through the circuit courts rather than through hearing officers).

113. Holman, *supra* note 107, at 139.

review would result.[114] Interestingly, the author did not indicate how judicial action could be distinguished from executive action.

In short, the comment delineated a non-statutory means of converting zoning or rezoning decisions to a heightened form of scrutiny without challenging the standard of review offered to legislative actions, believing as did Mandelker and Babcock that "[e]limination of . . . abuses can be accomplished through the elimination of procedural informality and the requirement of more thorough judicial review."[115] The focus was not on consistency as a measure of substantive due process, but rather on remedying what the author perceived to be procedural due process abuses.

Holman's *Ohio State Law Review* comment might have had little importance but for its role in *Fasano v. Board of County Commissioners*.[116] In *Fasano*, the Oregon Supreme Court held (1) that rezoning decisions were quasi-judicial and (2) that, among other requirements, "it must be proved that the change is in conformance with the comprehensive plan."[117] The court's two holdings, however, came from different rationales.

In arriving at its first holding, the court reviewed the nature of local government regulation, stating that "we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts."[118] The court differentiated the general zoning ordinance, which established the policies of general applicability, from the application of the ordinance to a specific property.[119] The court adopted the test for determining legislative from judicial actions from Holman's comment[120] and, in applying it, determined that rezonings were quasi-judicial actions.[121] Thus, in a single stroke, the court removed from rezoning actions the deference reserved for legislative acts.

In arriving at its second holding, the court turned to the Oregon planning statute and determined that "[t]he purpose of the zoning ordinance, both under our statute and the general law of land use regulation, is to 'carry out' or implement the comprehensive plan,"[122] thus

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114. *Id.* at 140-41. It is probably not accidental that these requirements dovetail with those desired by Richard F. Babcock in THE ZONING GAME (1966), as Babcock is cited several times in the article. Thus the standards which Babcock wished to see imposed by state legislatures on local governments became court-imposed rules under Holman's concepts.

115. Holman, *supra* note 107, at 132.

116. 507 P.2d 23 (Or. 1973).

117. *Id.* at 28.

118. *Id.* at 26.

119. *Id.* at 27.

120. *Id.*

121. *Id.* at 28.

122. *Id.* at 27.

establishing the country's first important consistency requirement. The court placed the burden of proof to show consistency on the party seeking to change existing zoning[123] and, without elaboration, approved of the procedural suggestions set out by Holman in the *Ohio State Law Review* comment.[124] In a note addressed to those who might criticize its drastic changes in the law, the court stated that "having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared."[125]

Despite its significance, the *Fasano* opinion is as important for what it did not say as for its holding. For example, the *Fasano* court did not say that the statutory requirement that zoning decisions had to conform to the comprehensive plans somehow made the decisions quasi-judicial.[126] Furthermore, the court did not say that substantive due process concerns about the relationship of the zoning action to the public health, safety, and welfare required the imposition of a consistency doctrine. Rather, the *Fasano* decision held that the application of a zoning ordinance to a specific piece of property, not the consistency doctrine, created the "judicial" nature of the action.[127]

The *Fasano* court did, however, use Oregon's consistency requirement as a justification for judicially imposing the regime which Richard Babcock urged legislatures to adopt in order to address concerns about individual rights.[128] Because Oregon law did not provide for an independent action to determine consistency, defining rezonings as quasi-judicial was the easiest way the court could provide for a non-deferential review of individual zoning actions. It was not, however, the only way. For example, the court could have declared that, under Oregon law, rezonings which proved inconsistent with the comprehensive plan were void as outside local authority, and thus al-

123. *Id.* at 29.

124. *Id.*

125. *Id.* at 30.

126. This takes the opinion outside of the Florida approach to quasi-judicial actions set forth in *DeGroot*, 95 So. 2d 912 (Fla. 1957) (see *supra* note 74 and accompanying text), which predicates quasi-judicial determinations on the way in which an otherwise *executive* decision is made. If the consistency requirement in *Fasano* meant that the local government was bound to approve a petition if it was consistent, it would have converted the legislative function of the local government into an executive function, which could have been determined to be quasi-judicial based on their procedures. Because the *Fasano* court adopted the Ohio State comment's approach, which did not distinguish judicial decisionmaking from executive decisionmaking, the court did not address the role of the consistency requirement itself in shaping the nature of rezoning actions.

127. 507 P.2d at 26.

128. *Id.* at 27-28.

lowed those cases to be tried in an original action. This would have given challengers a de novo review of land use decisions, but would not have required local governments to maintain the procedural safeguards required by the quasi-judicial characterization. Furthermore, the *Fasano* court could have placed the burden of proof either on the moving party or the local government.[129]

The concern for process expressed in the *Ohio State Law Review* comment and by the Oregon Supreme Court in the *Fasano* decision were mirrored by a 1980 *Florida State University Law Review* comment.[130] Author Carl Peckinpaugh identified two possible methods of eliminating the arbitrary results generated by the "fairly debatable" standard of review. The first method involved shifting the burden of showing the reasonableness of a land use decision to the local government after an aggrieved landowner produces evidence that the decision was unreasonable or would result in significant financial loss.[131] This method was rejected as both inflexible for the local government and difficult for the courts to apply.[132] The second method discussed by Peckinpaugh was to label rezoning actions as quasi-judicial matters.[133] Following the analysis of the Holman comment, Peckinpaugh stated that "enactment of a comprehensive zoning ordinance or land use plan would be considered legislative in nature, while zoning or rezoning of relatively small, specific land areas would be characterized as judicial or quasi-judicial actions."[134] Peckinpaugh also reviewed the *Fasano* decision, and traced the approval of some form of heightened review of rezonings by courts in Washington, Colorado, Montana, Nevada, and Kansas.[135]

Continuing, Peckinpaugh maintained that the legislative imposition of the consistency requirement was what distinguished this new way of reviewing land use decisions from the old "fairly debatable" standard.[136] The author indicated that Florida's 1975 Local Government

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129. The court's choice of remedies should be seen as a policy decision intended to ensure that micro concerns regarding individual actions were addressed. This micro approach did little to identify the types of planning which would be appropriate for the kind of close scrutiny called for by the decision. It therefore did little to address macro level consistency issues. Mandelker's article, written several years after *Fasano*, can be seen as an attempt to bring the macro considerations back into the consistency doctrine discussions. *See* MANDELKER, *supra* note 84.

130. Carl Peckinpaugh, Jr., Comment, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U.L. REV. 499 (1980).

131. *Id.* at 501.

132. *Id.* at 502-04. The author describes how the burden shifting approach had been taken by Virginia and New York courts.

133. *Id.* at 504.

134. *Id.*

135. *Id.* at 506.

136. *Id.*

Comprehensive Planning Act (LGCPA), with its requirements for local government comprehensive plans and consistency, made land use decisions analogous to decisions made by administrative agencies, in that local governments would be "exercising powers delegated from the state pursuant to statutes containing specific guidelines."[137] Under such a structure, Peckinpaugh concluded, "[a] requirement that local governments' land use decisions comport with these guidelines, as embodied in the *Fasano* approach, would be more consistent with Florida's rigorous approach to the delegation of power than is the present deference to local decisionmaking."[138]

In fact, the author maintained, the restrictions placed on local government by the state made local governments' land use authority "quasi-legislative," with the important result that "the test for validity of the actions would be whether the legislative standards or guidelines were complied with."[139] Once zoning decisions were recharacterized as quasi-legislative or quasi-judicial, review by certiorari would be available.[140] The use of this writ would be practicable because, following *Fasano*, a written record would be required.[141]

These attacks on the legislative nature of rezonings, and the efforts to replace the lenient treatment afforded those decisions with quasi-judicial approaches to review, were not based on a desire to improve zoning as a public policy. Rather, those efforts were attempts to limit in an expedient fashion the discretion enjoyed by local governments in order to prevent prejudiced or influenced decisionmaking. The proponents of the view that rezoning is quasi-judicial activity did little to harmonize their approach with the consistency doctrine. While concern for individual rights was expressed by the consistency theorists

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137. *Id.* at 512.

138. *Id.* at 511 (citation omitted). The author went on to cite Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978), for the proposition that the Legislature cannot delegate land use power without policy guidelines. The author apparently overlooked the difference between delegation to a state agency, limited by FLA. CONST. art. II, § 3, and the powers to legislate granted to local governments under article VIII, sections 1 (counties) and 2 (municipalities), which provide that these entities have authority to legislate, except as provided by general law (for charter counties and municipalities) and to the extent provided by general law (for non-charter counties). A failure to set guidelines for local government legislative authority therefore does not violate the separation of powers.

139. *Id.* at 518 (citation omitted). Again, the comment overlooks the fact that local government compliance with legislative limitations always has been required. *See, e.g.*, City of Miami Beach v. Frankel, 363 So. 2d 555 (Fla. 1978), in which the Florida Supreme Court held that while the City had the authority under home rule to adopt a rent control ordinance, the city had not complied with a state statute limiting rent controls; therefore, the rent control provision was void.

140. Peckinpaugh, *supra* note 130, at 515.

141. *Id.* at 512. If the record did not show that the guidelines were followed, the action would be overruled on appeal.

discussed in Part II, those authors intended to effect a more comprehensive reform in which procedural safeguards would flow from a systematic approach to defining the proper actions of government. Nonetheless, following *Fasano*, the consistency doctrine and the concept that rezonings are "quasi-judicial" became entwined.

IV. FLORIDA'S STATUTORY CONSISTENCY REQUIREMENT

The Local Government Comprehensive Planning Act (LGCPA) of 1975[142] required local governments to adopt comprehensive plans and expressed the intent that land development regulations and development orders be consistent with the plans.[143] The LGCPA had little effect on land use practices, due in part to the loose language of the consistency requirement[144] as well as the Florida Supreme Court's treatment of standing to challenge inconsistent development orders in *Citizen's Growth Management Coalition v. City of West Palm Beach*.[145] After a concentrated study of the failures of the LGCPA,[146] the Local Government Comprehensive Planning and Land Develop-

142. Ch. 75-257, 1975 Fla. Laws 794 (current version at FLA. STAT. § 163.2301 (1991)).

143. Pelham, *supra* note 66, at 542.

144. *Id.* The looseness of the consistency requirement of the LGCPA is reflected in cases such as Allapatah Community Ass'n v. City of Miami, 379 So. 2d 387 (Fla. 3d DCA 1980), which indicate that the "fairly debatable" test remained the law in Florida after the adoption of the 1975 LGCPA; *see also* City of Gainesville v. Cone, 365 So. 2d 737 (Fla. 1st DCA 1979), for the proposition that the LGCPA did not require consistency between map amendment decisions and the local plan.

145. 450 So. 2d 204 (Fla. 1984). *See* Pelham, *supra* note 66, at 543, n.158, and accompanying text. The result was that no one had the ability to challenge a local government's decision on the grounds of consistency with the comprehensive plan. As is noted later, the courts maintained the "fairly debatable" standard after adoption of the LGCPA.

146. *See* Pelham, *supra* note 66, at 517-21. Studies of the LGCPA included the ENVIRONMENTAL LAND MANAGEMENT STUDY COMM. FINAL REPORT (Feb. 1984) (available at the Law Library, Florida State University College of Law, Tallahassee, Florida, 32306), produced by the Environmental Lands Management Study Committee (ELMS II) appointed by Governor Graham in 1982. *See also* PROCEEDINGS OF THE ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE (Feb. 1984) (available at the Law Library, Florida State University College of Law, Tallahassee, Florida 32306). Many government and private planners, academics, and local government representatives testified before the Committee about the state of planning in Florida and elsewhere, and the recommendations of the Committee were therefore based on much of the development of the consistency doctrine described in Parts II and III of this article.

The Legislature, under the guidance of the Select Committee on Growth Management, conducted its own evaluation of the state of planning and local regulation. Publications of the Legislature included FACING FLORIDA'S FUTURE: SOLUTIONS FROM THE SADDLEBROOK CONFERENCE (available at the Law Library, Florida State University College of Law, Tallahassee, Florida 32306), and a two volume SELECT COMMITTEE ON GROWTH MANAGEMENT, LEGISLATIVE INITIATIVES (Oct. 1984) (available at the Law Library, Florida State University College of Law, Tallahassee, Florida 32306), which included staff reports and growth management bills reported to the Legislature during the 1983 and 1984 legislative sessions.

ment Regulation Act (Planning Act) was adopted in 1985[147] with the explicit goal of correcting the implementation problems of the 1975 statute.[148]

A. Provisions of the 1985 Planning Act

Several points within the intent section of the Planning Act[149] are important. First, the new Act was intended to strengthen comprehensive planning programs,[150] which were established to ensure the protection of local health, safety, and welfare.[151] Additionally, the Legislature clearly enunciated its view of the relationship of the plan to regulatory activities: "It is the intent of this act that . . . no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act."[152] Finally, the Legislature expressed its view of the powers of local government to regulate the use of land, noting that the repeal of the zoning enabling acts was intended as a recognition of the home rule authority to regulate land use.[153] The Legislature reconfirmed that, under the Planning Act, it had provided "the necessary statutory direction and basis for municipal and county officials to carry out their comprehensive planning and land development regulation powers, duties, and responsibilities."[154]

This language makes clear that the Planning Act forms a set of statutory directives for the use of local government authority. If the Legislature's intent had been to fundamentally alter the nature of local government regulatory powers, that is, to make individual decisions executive in nature, the Legislature had the opportunity to indicate that intent, but declined to do so. Nothing in the intent language of the Planning Act indicates that rezonings should be considered as other than legislative acts. To the contrary, the intent language indicates that the Legislature viewed the statute as a method by which the local government's legislative actions could be assured of validity.[155]

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147. Ch. 85-55, 1985 Fla. Laws 207 (current version at FLA. STAT. §§ 163.3161-.3215 (1991)).

148. *See* Pelham, *supra* note 66, at 543-44. The cumulative wisdom represented by the aforementioned articles also was brought to bear in drafting the provisions of the 1985 Act and the 1986 "glitch bill." Ch. 86-191, 1986 Fla. Laws 1404. As a review of the Planning Act demonstrates, many of the issues discussed in the earlier articles were explicitly addressed.

149. FLA. STAT. § 163.3161 (1991).

150. *Id.* § 163.3161(2).

151. *Id.* § 163.3161(3).

152. *Id.* § 163.3161(5).

153. *Id.* § 163.3161(8).

154. *Id.* This section seems to indicate a view that local land regulatory actions are not affected by the Planning Act, except that the Act places limits on the breadth of their activities.

155. *Id.*

The substantive requirements of the Planning Act carry out the intent of the Legislature that planning establish the health, safety, and welfare basis of land use regulation. The Planning Act requires all local governments to adopt local comprehensive plans,[156] sets out general content requirements which are to be specified by rule,[157] procedures for the adoption[158] and amendment[159] of the plans, and provides a system by which a state agency shall review the plans.[160]

The Planning Act also addresses the status of comprehensive plans and their relationship to development decisions in section 163.3194. The first subsection, for example, requires that "[a]fter a comprehensive plan . . . has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, government agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted."[161] With respect to regulations, "[a]ll land development regulations enacted or amended shall be consistent with the adopted comprehensive plan," and during the period in which any existing regulations which are not consistent are being brought into conformity "the provisions of the most recently adopted comprehensive plan . . . shall govern any action taken in regard to an application for a development order."[162] Thus, by its terms, the Planning Act requires consistency and any action taken by a local government inconsistent with the plan is void.[163] Furthermore, the plan's provisions have regulatory

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156. *Id.* § 163.3167(2).

157. *Id.* § 163.3177. Chapter 9J-5 of the Florida Administrative Code elaborates on the content requirements, describing both the planning data and analysis and the types of policies and objectives which are to be included in each element.

158. *Id.* § 163.3184.

159. *Id.* § 163.3187.

160. *Id.* § 163.3191.

161. *Id.* § 163.3194(1)(a).

162. *Id.* § 163.3194(1)(b).

163. The language of the Planning Act mandates that actions "shall" be consistent. When the Legislature puts such directives into general law, local ordinances which violate them are void. In Bhoola v. City of St. Augustine Beach, 558 So. 2d 666, 667 (Fla. 5th DCA 1991), the court invalidated a zoning map amendment for failure to follow statutory notice requirements, stating "[t]he city had no authority to enact the ordinance without complying with the statutory mandated . . . requirements." *See also* Linville v. Escambia County, 436 So. 2d 293 (Fla. 1st DCA), *review denied*, 444 So. 2d 416 (1983). Legislative limitations on local powers invalidate any action taken in contradiction to them. *See, e.g.*, FLA. STAT. § 166.043 (1991), which limits municipal authority to adopt rent and price controls, and City of Miami Beach v. Frankel, 363 So. 2d 555, 558 (Fla. 1978), where the Florida Supreme Court held that the failure of the city to follow the requirements of section 166.043 in adopting a rent control ordinance rendered the ordinance void.

For an example of the courts construing state constitutional limitations on local government powers, see City of Tampa v. Birdsong Motors, 261 So. 2d 1 (Fla. 1972), where the Florida Supreme Court interpreted the constitution adopted in 1968 to invalidate an earlier special act giving Tampa the right to enact occupational license fees.

authority even if no implementing regulation exists or if a regulation is inconsistent with the provisions.[164]

The Planning Act, as applied to development, contains two identical definitions of consistency. First, the Act specifies that development orders or land development regulations are consistent with the comprehensive plan

> if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.[165]

A second definition reaches development which could occur absent a development order. Section 163.3194(3)(b), *Florida Statutes*, provides that "development approved or undertaken by a local government" shall be consistent with the comprehensive plan based on the same criteria as above, with the addition of capacity or size and timing. This provision requires that infrastructure improvements and other activities that might otherwise fall outside the scope of the definition of development order be consistent. Thus the general rule for evaluating consistency, based on the statutory definition, is whether the uses, densities and intensities, capacity or size, timing and other characteristics of development further and are compatible with the objectives and policies of the plan.

The Planning Act also instructs the courts in their role in determining whether actions are consistent.

> (a) A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. . . . [B]ut private property shall not be taken. . . .
> (b) It is the intent of this act that the comprehensive plan set general guidelines and principles concerning its purposes and contents and that this act shall be construed broadly to accomplish its stated purposes and objectives.[166]

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164. FLA. STAT. § 163.3201 (1991).
165. *Id.* § 163.3194(3)(a).
166. *Id.* § 163.3194(4).

The Act thereby instructs courts to require that any development be consistent with the comprehensive plan's objectives and policies. In addition, the Act implies that courts should refuse to enforce unreasonable policies and objectives. Furthemore, the courts may not allow an interpretation of a plan which would so restrict property rights as to constitute a taking. Beyond those limitations, however, the plan must be construed and related to the challenged government action or regulation. Therefore, the courts should use traditional means of interpreting statutes and ordinances to determine both the meaning of the objectives and policies and whether the challenged actions or regulations further and are compatible with them.[167]

Before examining the methods by which consistency may be enforced under the statute, one must examine the two approaches to defining rezonings which coexist in the Planning Act. Under the Act's first approach, a development permit is defined as "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land."[168] A development order is "any order granting, denying, or granting with conditions an application for a development permit."[169]

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167. The court should examine the density, intensity, etc. of a challenged development order and, given the plain language of an objective or policy, determine whether it furthers and is compatible with the objective or policy. If the plain language is vague, standard techniques of statutory interpretation should be used to establish its meaning. As with any vague statute, if a policy or objective is too vague to be given legal import, the court can declare it invalid, at least for regulatory purposes. Finally, the following basic tenets of statutory construction, stated by the court in State *ex rel* Register v. Safer, 368 So. 2d 620 (Fla. 1st DCA 1979), and applied to a local plan should prevent arbitrary or unreasonable results:

> 1) The courts have no legislative function, but simply seek to effect the intent of the legislature.
>
> 2) While legislative intent must be effectuated, the courts will not ascribe to the legislature an intent to create absurd or harsh consequences; when two or more interpretations may be given to a provision, the courts should choose the one which best serves the purpose of the statute.
>
> 3) In ascertaining the legislative intent, the court will consider the history of the legislation, the evil to be corrected, and the law then existing.
>
> 4) Where a literal interpretation of the legislation would lead to an unreasonable conclusion or a result not intended by the legislature, the court's duty is to interpret the law in accordance with legislative intent.
>
> 5) Statutes must be interpreted so as to avoid absurd results.
>
> 6) Legislative intent should be gathered from legislation as a whole rather than from any single provision.

368 So. 2d at 624 (citations omitted).

168. FLA. STAT. § 163.3164(7) (1991).

169. *Id.* § 163.3164(6). The inclusion of the denial of a permit indicates that the refusal to rezone must be as consistent with a plan as the granting of a rezoning petition. Thus property owners should be entitled to a rezoning unless the rezoning would be inconsistent with the plan. In this provision, the otherwise macro approach to consistency reflected by the act takes on a micro aspect.

The inclusion of rezonings with development permits, especially given the use of the word "order" to describe development permits, puts rezonings in the class of administrative or executive actions.[170]

Under the Act's second approach, rezonings are defined in a class of legislative decisions. The definition of land development regulations includes "ordinances enacted by local bodies for the regulation of any aspect of development and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land, *except that this definition shall not apply in section 163.3213.*"[171]

Section 163.3213 authorizes the challenge of land development regulations to determine consistency. For the purposes of this section, a land development regulation is defined as

> an ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation or any other regulation concerning the development of land. *This term shall include a general zoning code, but shall not include a zoning map, an action which results in zoning or rezoning of land*, or any building construction standard adopted pursuant to and in compliance with the provisions of Chapter 553.[172]

The statute then provides an elaborate approach to administrative appeal.[173] Perhaps the most important aspect of the challenge procedure is that it "shall be the sole proceeding available to challenge the consistency of a land development regulation with a comprehensive plan adopted under this part."[174]

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170. Under section 120.52(11), *Florida Statutes* (1991), an order is defined as final agency action. The term is clearly identified with executive, as well as judicial, action.

171. FLA. STAT. § 163.3164(22) (1991) (emphasis added).

172. *Id.* § 163.3213(2)(b) (emphasis added).

173. Land development regulations may be challenged within 12 months of their adoption, predicated upon giving notice to the local government and the Florida Department of Community Affairs (DCA), which will review the issue. FLA. STAT. § 163.3213(3) (1991). If the DCA finds the regulation consistent with the plan the petitioner may request an administrative hearing. *Id.* § 163.3213(4). If the DCA finds the regulation inconsistent with the plan, it will request an administrative hearing. *Id.* § 163.3213(5). If the administrative hearing officer finds the regulation inconsistent with the plan, the case is sent to the Administration Commission (comprised of the Governor and Cabinet) for a determination of sanctions. *Id.* § 163.3213(6).

174. *Id.* § 163.3213(7). Given that under the terms of the Planning Act land development regulations that are inconsistent with the plan are void ultra vires, this limitation is very odd. Section 163.3213(9) holds that the initiation of an administrative challenge does not affect the validity of the regulation, and the Administration Commission's sole remedy against the local government is to impose sanctions, which may include the suspension of certain revenue sharing funds. This framework provides no way to invalidate a regulation which is outside the power of the local government to adopt or maintain. The only rationale for such a policy is the fear that entire regulations, rather than offending parts, might be struck, leaving a community with no regulation in effect.

The Planning Act's provision for challenging development orders is more important than the provision for challenging land development regulations, primarily because local governments issue so many orders.[175] In addition, because rezonings and map amendments are excluded from the definition of land development regulations for the purpose of consistency challenges, the development order challenge comprises the sole statutory provision for determining the consistency of a rezoning. Under section 163.3215(1), an "aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order . . . that is not consistent with the comprehensive plan adopted under this part."[176] Aggrieved or adversely affected parties include those with interests in the general health and safety of the community, fire protection, and other services.[177]

Parties with standing may bring suit against the local government only if they file a "verified complaint"[178] setting forth the facts on which the complaint is based within thirty days of the alleged inconsistent action, to which the local government has thirty days to respond; the complainant must file the action within thirty days of the local government response or when the response was due should the government fail to respond.[179] The section does not apply to development orders which were granted prior to October 1, 1985, or to an application for such made prior to July 1, 1985.[180] A final, yet critical, provision is that this statutory process "shall be the *sole* action available to challenge the consistency of a development order with a comprehensive plan adopted under this part."[181]

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175. Allowing challenges to individual development orders is the only way that micro concerns can be addressed. The ability of persons affected by either the granting or denying of a development order to mount a meaningful challenge to the action prevents both discrimination and favoritism to individual petitioners, as opposed to the public interest.

176. FLA. STAT. § 163.3215(1) (1991). The provision for an action for declaratory or injunctive relief is inconsistent with an appeal, but is consistent with the view that the Legislature created an original action for consistency challenges.

177. *Id.* § 163.3215(2). Section 163.3215, subsections (1) and (2), is an obvious legislative overruling of Citizens Growth Management Coalition v. City of West Palm Beach, 450 So. 2d 204 (Fla. 1984).

178. FLA. STAT. § 163.3215(4) (1991).

179. *Id.* § 163.3215(4). While the filing of a verified complaint is a condition precedent to the institution of an action, it does not preclude an action for a temporary injunction in cases where irreparable harm will result.

180. *Id.* § 163.3215(3)(a).

181. *Id.* § 163.3215(3)(b) (emphasis added). This subsection was completely ignored by the *Snyder* court, which permitted consistency to be raised in the circuit court in a certiorari appeal of the denial.

B. *The Planning Act and the Status of Rezonings*

Clearly, nothing in the structure or definitions of the Planning Act directly provides that rezonings have been converted to administrative acts. The only substantial difference between a development order and a land development regulation, other than how they are challenged, is that a land development regulation must be reviewed by the Local Planning Agency (LPA), which may or may not be the governing body itself, for a review and recommendation.[182] Given that the LPA need not make specific findings,[183] and that its opinion bears no legal significance,[184] the requirement means little or nothing in the context of the validity of a rezoning action except that an additional board hears the petition. In addition, the statute places no requirement on local governments to adopt findings or create a written record when undertaking zoning actions. This has led at least one federal court to conclude that zoning actions remain legislative in nature.[185] The best case that can be made for claiming that rezoning decisions are administrative under the Planning Act is that local governments no longer have the authority to deny a rezoning application if it is consistent with the local comprehensive plan. In other words, the local government's role is the administrative determination of the facts that bear on consistency. Because a hearing is required, the rezoning is quasi-judicial under *DeGroot v. Sheffield*.[186] The various approaches of the courts to challenges involving subdivision approvals parallel this logic and are illustrative of the problem consistency poses for the courts.

Subdivision applications must be approved by the local governing body under the provisions of section 177.071.[187] Although chapter 177 provides minimum requirements for the recording of a subdivision

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182. *Id.* § 163.3194(2).

183. *Id.*

184. *Id.*

185. In DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479 (M.D. Fla. 1989), *aff'd*, 888 F.2d 766 (11th Cir. 1989), the court concluded that deferential review was due a town's construction and application of its zoning ordinance. The lack of a requirement of findings of fact was one aspect of the legislative nature of the action. *Id.* at 1498 n.19. The court, in a textbook example of the problem described by Siemon in *Paradox*, *supra* note 73, noted that even "[a] showing that various individuals were motivated by irrational fear and prejudice against learning disabled students does not create an issue of fact as to whether or not the legislative facts . . . could not be conceived to be true by the governmental decision maker." *Id.* at 1502. Thus any pretext which is conceivably true would validate the action against a due process challenge. Given these kinds of decisions, it is no wonder that attacks on the legislative character of rezonings have accompanied much of the debate on the consistency doctrine.

186. 95 So. 2d 912 (Fla. 1957).

187. FLA. STAT. § 177.071 (1991). While the local governing board must approve the plat, the statute does not require approval by ordinance.

plat, local governments may impose additional conditions.[188] Such conditions are generally imposed in a local land development regulation, so the issue of whether the local government has discretion to deny a supposedly complete application has been litigated. In *Broward County v. Narco Realty*,[189] for example, the court held that a trial court's issuance of a writ of mandamus ordering the County Commission to approve a plat was appropriate because all the legal requirements for the plat had been met.[190] Later, in *City of Coconut Creek v. Broward County Board of County Commissioners*,[191] the court clarified *Narco Realty*, noting that the legal requirements might include the discretionary approval of the local board.[192] In such a case, mandamus would not lie.[193] A more recent case on subdivision approval is *Broward County v. Florida National Properties*.[194] In *Florida National*, the issue was whether the Board of County Commissioners could require a plat to contain a limiting notation as a means of ensuring that future actions would comply with its regulations.[195] The trial court had granted review on certiorari. In a divided opinion, the appellate court held that the notation was improper on the basis of the construction of the ordinance.[196]

The aforementioned cases illustrate that the extent and type of control imposed by regulations or statutes on a given type of decision determines the nature of the decision.[197] The operative issue in the subdivision cases is whether all requirements established in the local ordinances and state statute have been met. If so, the action is classically executive except for the statutory requirement that the local body adopt the plat. Applying this rationale, if the statutory definition of consistency requires the local government to approve rezonings shown to be consistent with the comprehensive plan,[198] the action is executive

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188. *Id.* § 177.071.

189. 359 So. 2d 509 (Fla. 4th DCA 1978).

190. *Id.* at 511. Mandamus will not lie for a discretionary action. The court's approach was similar to that taken in cases where special exceptions must be approved by a governing body.

191. 430 So. 2d 959 (Fla. 4th DCA 1983).

192. *Id.* at 963. The court explains its holding in Broward County v. Coral Ridge Properties, 408 So. 2d 625 (Fla. 4th DCA 1982).

193. 430 So. 2d at 963.

194. 510 So. 2d 1247 (Fla. 4th DCA 1987).

195. *Id.* at 1249.

196. *Id.* at 1250. The court emphasized the construction of the ordinance as the controlling issue.

197. See *supra* notes 95-98 and accompanying text for a discussion of how the framework of discretion makes the granting of special exceptions quasi-judicial when made by boards or commissions.

198. The language of the Act supports this proposition. *See supra* notes 166-69 and accompanying text.

in nature.[199] In such a case, the local government would be without discretion to deny the application if it was shown to meet procedural, content, and consistency requirements. This application of the statutory requirement has the effect of transforming all development orders into administrative action, wherein the local government simply finds facts regarding the consistency of the proposal and acts according to the facts found.

In sum, the definitional and intent provisions of the Planning Act create an ambiguity about the status of rezoning decisions. Under the definition section, rezonings fall into both administrative and legislative types of decisions. On the other hand, the intent section contains no explicit indication that the Legislature desired to alter the deference given such decisions by the courts. Nevertheless, the statutory provisions for challenging decisions based on consistency categorize rezonings with activities that are clearly and historically administrative in nature. Finally, if the consistency doctrine is read to oblige local governments to approve rezoning applications that are consistent with the local comprehensive plan, then the courts' treatments of subdivision and special exception cases indicate that the rezonings have become administrative rather than legislative. The treatment given the consistency doctrine itself, therefore, is a key to determining whether rezonings have become quasi-judicial.[200]

V. THE FLORIDA COURTS AND THE CONSISTENCY DOCTRINE

The history of the consistency doctrine can be divided into two eras. The first era, extending from 1985 to 1987, contained three cases which set the stage for later developments. The second era extends from 1987 to the *Snyder* decision in 1991. Depending on how other courts treat the *Snyder* decision, a new era may be evolving.

A. The Early Cases

Prior to the adoption of the 1985 Local Government Comprehensive Planning and Land Development Regulation Act (Planning

199. Such a case has been made. *See supra* notes 164-70, *infra* notes 207-09 and accompanying text. But see *infra* notes 210-14 and accompanying text for an opposing view and criticism of the opposing view. Section 163.3194(4)(b), *Florida Statutes* (1991), calling for the Act to be construed broadly to achieve its purposes, would support the courts in holding that rezonings consistent with the local plan must be approved.

200. Even if rezoning is characterized as quasi-judicial, the hearing provided by section 163.3215 remains, by its terms, the exclusive means of challenging the consistency of a rezoning. While rezonings might be challenged on sufficiency of the evidence or other legal grounds in a certiorari appeal, consistency determinations are governed by the statute.

Act),[201] Florida case law made clear that zoning and rezoning was a legislative act, to which due process challenges were to be reviewed by application of the "fairly debatable" standard, with a presumption of validity attaching to such actions.[202] As legislative action, rezoning decisions could be challenged only by an action for declaratory or injunctive relief.[203] The Florida Supreme Court had the opportunity to change the status of rezonings through its interpretation of the 1975 Local Government Comprehensive Planning Act (LGCPA)[204] in *Citizens Growth Management v. City of West Palm Beach*,[205] but chose not to do so. Therefore, as of the adoption of the 1985 Planning Act, the case law following *Village of Euclid v. Amber Realty Co.*[206] determined the basis and nature of rezoning actions.

Three cases decided between 1985 and 1988 shaped the treatment of the Planning Act's consistency requirement. First, a concurring opinion in *Cape Canaveral v. Mosher*[207] maintained that a trial court correctly applied the consistency requirement in the 1975 LGCPA to void a rezoning adopted by the city. Examining the consistency requirement, Judge Cowart addressed what the Florida Supreme Court had avoided and announced an interpretation of consistency.

> The word "consistent" implies the idea or existence of some type or form of model, standard, guideline, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified by the norm, it is "consistent" but if the compared item deviates in any direction or degree from the parameters of the norm, the compared item or action is not "consistent" with the norm.[208]

Judge Cowart noted that the zone district applied by the city was more restrictive than that allowed by the plan, noting that the use of

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201. *See supra* note 10 and accompanying text.

202. Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959); Allapattah Community Ass'n v. City of Miami, 379 So. 2d 387 (Fla. 3d DCA 1979).

203. *See* Peckinpaugh, *supra* note 130, at 515. The longstanding rule is that certiorari review of legislative or purely executive actions is not permitted. Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967).

204. *See supra* note 9 and accompanying text.

205. 450 So. 2d 204 (Fla. 1984).

206. 272 U.S. 365 (1926).

207. 467 So. 2d 468 (Fla. 5th DCA 1985) (Cowart, J., concurring).

208. *Id.* at 471. It is perhaps unfortunate that Judge Cowart used the phrases "in accordance with," "in agreement with," and "within the parameters specified," while the Legislature used the terms "compatible with" and "furthers" to describe consistency; however, the decision was handed down on April 18, 1985, while the Act was in the process of being adopted.

the plan to implement "cumulative zoning" was not only inconsistent, but poor planning.[209]

The second important case during this era was *Southwest Ranches Homeowners Ass'n v. County of Broward*.[210] *Southwest Ranches* involved a suit for injunctive relief filed by neighbors to block a landfill proposed by Broward County.[211] One of the claims brought was that a rezoning enacted by Broward County permitting the landfill to be developed was inconsistent with the Broward County Land Use Plan, which designated the area for agricultural uses.[212] The court rejected Judge Cowart's view that changed conditions would require the plan to be changed before a different zoning could be applied.[213] The court believed "the legislative scheme calls for a more flexible approach to the determination of consistency."[214]

The court ultimately held that the zoning ordinances would be subject to strict scrutiny only if the proposed land use was more intense than that indicated by the land use plan.[215] The court also noted that a public use, such as a landfill, was not inconsistent with the agricultural designation by the terms of the plan, that the policies of the coastal zone and potable water elements could be met by the proposed landfill, and that there was therefore "no basis for setting aside the trial court's conclusion that the proposed ordinances are consis-

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209. *Id.* at 470 n.4. Judge Cowart's position was treated favorably in John McPherson's, *Cumulative Zoning and the Developing Law of Consistency with Local Comprehensive Plans*, 61 FLA. BAR J. 71 (August 1987). McPherson also notes that "automatically treating land use districts as cumulative," as would occur if land uses were maintained at intensities or densities lower than that permitted by the plan, "can seriously undermine a sophisticated comprehensive plan" whose assumptions might be based on a certain distribution of intensities or densities. *Id.* at 73-74. The need to achieve planned densities or intensities is an aspect of the comprehensive plan which could be used to support granting a landowner's petition to upzone if consistent with the plan. This rationale is less drastic than the *Snyder* court's use of a substantive due process rationale to achieve the same end and is consistent with the language and intent of the Planning Act. *See supra* notes 165-69 and accompanying text.

210. 502 So. 2d 931 (Fla. 4th DCA 1987), *review denied*, 511 So. 2d 999 (Fla. 1987).

211. *Id.* at 932.

212. *Id.* at 931.

213. *Id.* at 936.

214. *Id.*

215. *Id.* The court based this decision on the logic of City of Jacksonville v. Grubbs, 461 So. 2d 160 (Fla. 1st DCA 1984), where the court denied a rezoning of property partly because the existing density was less than permitted by the plan. This approach ignores the planning principles discussed *supra* at note 209. Neither did the *Southwest Ranches* court indicate how it determined that the ordinance allowed a use more intense than permitted by the land use plan without subjecting both to the kind of scrutiny envisioned by Judge Cowart. The *Grubbs* and *Southwest Ranches* approach subverts both the land use map, because achieved densities need not meet planned densities, and the other policies of the plan, because the proposal is not strictly examined in light of these policies unless the densities on the land use map are exceeded.

tent."[216] While the court painstakingly evaluated the proposed development in light of the plan's goals,[217] the case is remembered for its "tiered" approach to the level of review.[218]

The most important of the earlier cases was *Machado v. Musgrove*.[219] *Machado* involved a citizen challenge to the rezoning of a parcel for commercial use in an area designated by the comprehensive plan's land use map as estate residential.[220] The court held that the consistency requirement was a restriction on the zoning powers of local governments and that

> [t]he test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies.[221]

In addition, the court held that the burden of proof was on the person requesting a change in zoning and that the evidence supporting the change had to be apparent from a verbatim record.[222] If the record is silent or the evidence shows a nonconformity, the rezoning is inconsistent.[223] The court, using the technique suggested by Judge Cowart in *Mosher*,[224] then examined the plan and found the rezoning inconsistent.[225]

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216. *Southwest Ranches*, 502 So. 2d at 937-38. These findings indicate that the court's treatment of Judge Cowart's approach was unnecessary, as the action would have been consistent even under his approach.

217. From the reported decision, it is impossible to determine whether the court failed to consider policies or objectives not mentioned in the decision.

218. *See* Mitchell, *infra* note 231, at 88.

219. 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1988).

220. *Id.* at 630.

221. *Id.* at 632. The court based its decision on the grounds that zoning was a tool to implement a legislative activity, namely the plan, under the rationale of *Southwest Ranches*, Charles Haar's *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1968), and the general consistency mandate of the Planning Act. *Id.* at 633. The court did not engage in a detailed examination of the provisions of the Planning Act, and the test cited here was of the court's own devise.

222. *Id.* at 632-33. The court cited Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973), and Peckinpaugh, *supra* note 130, for these propositions. The *Machado* court did not hold, as did the *Fasano* court, that rezonings were quasi-judicial, but the requirements placed upon local governments by the court are identical to those placed upon a quasi-judicial proceeding. It is therefore a small wonder that the courts following *Machado* have permitted review of rezoning petitions by certiorari.

223. *Machado*, 519 So. 2d at 632-33.

224. *Id.* at 634.

225. *Id.* at 635.

The court did not distinguish the limitations on local authority in the Planning Act from other limitations on local government authority, which have never been found in and of themselves to require otherwise properly adopted ordinances to provide the record and written requirements of quasi-judicial actions.[226] Hearing and notice requirements, in and of themselves, do not turn legislative action into quasi-judicial action.[227] The court took no steps to justify its analysis other than to refer to *Fasano* and Holman's *Florida State Law Review* comment.[228] Thus, the court never examined the statutory provisions of the Planning Act to determine how consistency should be implemented.[229] Moreover, the court failed to determine whether the action was preceded by a verified complaint, a procedural requirement to be met prior to the filing of any consistency action.[230]

The court thus employed the macro provisions of the Planning Act to implement its own micro policy while ignoring legislative mandates that specify the way micro policy should be created and reviewed.[231] The failure of the *Machado* court to examine these issues should be viewed as a severe limitation on its legal validity. Nonetheless, the *Machado* court has led other courts into similar decisions.

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226. For example, a county commission must adopt findings under section 190.05(2), *Florida Statutes* (1991), in order to establish a Community Development District. In State v. Frontier Acres Community Dev. Dist., 472 So. 2d 455 (Fla. 1985), the court held that the failure of the county commission to make required findings invalidated the establishment of a community development district. The court construed the statute strictly, holding that the requirement must be fully complied with for the action to be valid. *Id.* at 457-58. The court did not, however, indicate in any way that the county commission was acting in other than a legislative capacity, though the procedural strictures of the statute are far more detailed than those of the Planning Act. The establishment of special assessments under chapter 190 is another area where local governments must make explicit findings that are accorded legislative deference when reviewed.

Note that in the case of subdivisions, it is the Legislature's statutory mandate that local boards approve the plat that gives the action its quasi-judicial characteristics. Otherwise, the subdivision plat approvals are purely administrative.

227. *See* LaCroix, *supra* note 90. *See* Jennings v. Dade County, 598 So. 2d 1337, 1349 n.3. (Fla. 3d DCA 1991) ("An administrative body acts quasi-judicially when it adjudicates private rights of a particular person after a hearing which comports with due process requirements, and makes findings of fact and conclusion of law on the disputed issues.").

228. *Machado*, 519 So. 2d at 632-33.

229. The *Snyder* court also failed to undertake an examination of the statutory requirements.

230. *Machado*, 519 So. 2d at 634.

231. *See Machado*, 519 So. 2d 629. The *Machado* decision has been decried by some, *see* Stephen Helfman & Carter McDowell, *Consistency after Machado*, 63 FLA. BAR J. 67 (February 1989), and applauded by others, *see* Jerry Mitchell, *In Accordance with a Comprehensive Plan: The Rise of Strict Scrutiny in Florida*, 6 J. LAND USE & ENVTL. L. 79 (1990); Linda Bozung & Deborah Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners*, 20 URB. LAW. 969, 971-75 (1989). There has been no analysis of the decision's compliance with the terms of the statute.

B. *Consistency and Review in the Courts after* Machado

The Florida Supreme Court has yet to decide a case construing the Local Government Comprehensive Planning and Land Development Regulation's consistency requirement. Cases involving section 163.3215 have been heard in each of the district courts. This section will review the current state of the law in the district courts.

The Third District continues to review substantive due process challenges to zoning decisions on a "fairly debatable" basis,[232] yet it reviews consistency challenges on a "strict scrutiny" basis[233] and permits appeal of zoning decisions by certiorari.[234] In *Jennings v. Dade County*,[235] the court held that ex parte communications in a quasi-judicial proceeding for a variance might violate the plaintiff's due process rights.[236] The court, citing *Machado*, stated that adopting and amending zoning ordinances is a legislative act.[237] Nonetheless, the court has viewed consistency as an issue for certiorari review, and even in de novo actions does not appear to ensure that a verified complaint has been filed.[238]

The Second District, after firmly declaring rezonings to be legislative in nature several months after the Third District's decision in *Machado*,[239] originally found rezonings to be quasi-judicial decisions

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232. *See* City of Miami v. Woodlawn Park Cemetery Co., 553 So. 2d 1227, 1230 (Fla. 3d DCA 1989), *review denied*, 563 So. 2d 631 (1990) (due process challenge to denial of rezoning for crematorium evaluated on "fairly debatable" standard); City of South Miami v. Meenan, 581 So. 2d 228 (Fla. 3d DCA 1991) (comprehensive plan map designation was an exercise of the zoning power and therefore held to "fairly debatable" standard).

233. *See* White v. Metropolitan Dade County, 563 So. 2d 117, 128 (Fla. 3d DCA 1989).

234. *See Woodlawn Park Cemetery*, 553 So. 2d at 1227. The Dade County zoning code apparently has offered appeal by certiorari to the circuit court for many years based on provisions in the Dade County Zoning Ordinance. *See* Dade County v. Marca, S.A., 326 So. 2d 183, 184 (Fla. 3d DCA 1976) (Dade County Ordinance 33-316 provides for certiorari review of zoning decisions); Land Corp. v. Metropolitan Dade County, 204 So. 2d 222 (Fla. 3d DCA 1967), *cert. denied*, 210 So. 2d 224 (1968) (referring to the same provision). This practice is contrary to the uniform jurisdiction requirements of FLA. CONST. art. V, § 5. *See infra* notes 328-31 and accompanying text.

235. 589 So. 2d 1337 (Fla. 3d DCA 1991).

236. *Id.* at 1340-41.

237. *Id.* at 1343.

238. In White v. Metropolitan Dade County, 563 So. 2d 117 (Fla. 3d DCA 1989), the court reviewed an appeal from the denial of an injunction where consistency with the comprehensive plan was one of several counts. The court did not indicate whether a review of the record showed that a proper verified complaint was filed prior to initiating the action for injunctive relief. By permitting certiorari review of decisions and requiring local governments to meet all the procedural requirements of an administrative test, however, the court indicates that consistency review by certiorari is appropriate.

239. Naples Airport Auth. v. Collier Dev. Corp., 513 So. 2d 247 (Fla. 2d DCA 1987).

reviewable by certiorari in *Manatee County v. Kuehnel*.[240] On rehearing, the court replaced its opinion and eliminated discussion of the quasi-judicial nature of rezonings, yet allowed the circuit court's review by certiorari to stand.[241] The county's denial of a rezoning was overturned because no competent substantial evidence supported the denial. While this standard appears to involve due process, *Kuehnel* was decided in the context of a rezoning determined to be consistent by staff. This leads to the conclusion that the Second District believes that a rezoning denial after a staff finding of consistency is quasi-judicial action reviewable by certiorari.

More recently, in *Hirt v. Polk County Board of County Commissioners*,[242] the court reversed a circuit court's denial of certiorari in a zoning case and held that the county board's action was quasi-judicial, despite finding that rezoning was a legislative act. The court determined that the government action was quasi-judicial by evaluating the petitioner's challenge and the manner in which the decision was made.[243] Overall, the court found that the Board made its decision after a noticed public hearing, and that the petitioner was challenging the application of a Planned Unit Development ordinance, not the underlying ordinance, and therefore deemed the action quasi-judicial and appropriate for review by certiorari.[244] *Hirt* reinforces the notion that the Second District is looking to the form, rather than the substance, of local government actions in determining whether local decisionmaking is administrative or legislative.

The First District, after an unfortunate detour, has clearly stated that certiorari is not to be used in consistency challenges. In *Gregory v. City of Alachua*,[245] the court ordered the lower court to make findings regarding consistency even though requests for injunctive relief on consistency grounds had been voluntarily dismissed because no verified complaint had been filed, holding that the lower court had

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240. 538 So. 2d 52 (Fla. 3d DCA 1989), *opinion replaced on rehearing*, 542 So. 2d 1356 (Fla. 3d DCA 1989), *review denied*, 548 So. 2d 663 (Fla. 1989). The withdrawn opinion appears at 14 Fla. L. Weekly 500.

241. See LaCroix, *supra* note 90, for a discussion of *Kuehnel*.

242. 578 So. 2d 415 (Fla. 2d DCA 1991).

243. *Id.* at 416-17.

244. *Id.* The best thing that can be said about this approach is that it allowed the court to avoid affirming or overruling its position in *Kuehnel*. The court was silent on whether characterizing the action based on the challenge prevents the local government from adopting procedures appropriate to that action. It also left open whether a local government holding a voluntary public rezoning fact finding hearing might find such action quasi-judicial when it would not be otherwise. Quasi-judicial acts are generally held to be distinguishable from legislative acts after a required hearing. *See* Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991).

245. 553 So. 2d 206 (Fla. 1st DCA 1989).

conducted an appellate review on the issue of whether the city's decision was based on substantial competent evidence by agreement of the parties.[246] Having done so, the court concluded that the lower court was obliged to review consistency as an essential element of the law.[247] Hence, in all reality, the district court allowed appellate review of consistency.

A year later, in *Leon County v. Parker*,[248] the First District retreated from these implications in *Gregory*. The court dismissed a consistency challenge filed in a certiorari action for failure to file a verified complaint and follow the procedures of section 163.3215. While *Parker* involved a subdivision rather than a rezoning, the court's strict adherence to the statute should serve to prevent the mistaken belief that rezonings are quasi-judicial actions.[249]

In *B.B. McCormick & Sons v. City of Jacksonville*,[250] the First District was faced with a consistency challenge to a development proposal rather than a rezoning. The court distinguished the rezoning cases on the basis that they involved issues of development intensity rather than other plan policies, but went on to apply an appropriate understanding of strict scrutiny.[251] The court rejected a fairly debatable standard for interpreting the policies of the plan and held that the proposal should be "carefully examined in light of the language of the plan, with regard to whether the local government's rationale can be reconciled with the provisions of the plan."[252]

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246. *Id.* at 207-10. The issue seemed to be whether there was substantial competent evidence to support a finding of consistency by the Board. No one questioned whether or why the record made before the city was pertinent in a consistency review. By requiring a review of the record made before the Board, the court caused certiorari challenges for consistency to be filed. *Id.* at 207.

247. *Id.* at 210. The court's treatment can be seen as allowing the verified complaint requirement to be bypassed by waiver.

248. 566 So. 2d 1315 (Fla. 1st DCA 1990).

249. The trial judge was ordered to dismiss the case on remand for failure to comply with statutory requirements, but with leave to amend the petition, as one plaintiff claimed that the verified complaint requirement had been met. *Id.* at 1316. The district court neglected to instruct the lower court that any new proceeding should be de novo, even though the opinion holds that the broad provisions for relief apply to third party challengers as well as to those whose development orders have been denied. *Id.* at 1317. This holding overturned the trial judge's opinion that the remedies applied only to third party challengers, and that only traditional remedies were available to parties whose development permits had been denied. *Id.*

250. 559 So. 2d 252 (Fla. 1st DCA 1990).

251. *Id.*

252. *Id.* at 257. In this case, rejecting the fairly debatable standard meant rejecting the city's post hoc interpretations of the meaning of the plan policies. The original action was for injunctive relief, and the record reviewed by the court was the trial record, not the record from the city's approval of the project. *Id.* The court did not report whether the plaintiffs complied with the verified complaint provision of section 163.3215, *Florida Statutes*.

The plan policies in question dealt with the location of development in or near wetlands.[253] The court examined the wording of the plan policies and found that the words "should" and "discourage" did not prohibit development in wetlands.[254] The court also examined the intent of the planner who supervised the drafting of the policies and found the interpretation consistent with that intent.[255] Furthermore, the court compared the proposal to the policies and found that the evidence supported the trial court's determination that the development was consistent with the plan policies.[256] In short, the court treated the case as it would a case involving the construction of a statute or administrative rule.[257]

In the Fourth District, two cases have addressed the consistency of rezonings. In *Palm Beach County v. Allen Morris Co.*,[258] the court upheld the county's grant of a rezoning and special exception. The trial court had upheld the rezoning against a consistency challenge based on the fairly debatable rule, but had overturned the special exception.[259] The district court upheld the trial court's ruling on the consistency challenge, noting the existence of evidence on the record which supported the finding.[260] A significant problem with the case is that the district court approved the trial court's use of the "fairly debatable" test, under which the County's decision was presumed valid, and upheld that decision on the basis that some competent evidence existed to support the County's interpretation of the plan policies involved.[261] This indicates that the court did not carefully examine the policies at issue. Furthermore, it appears that the court undertook the consistency review on the basis of the record below in a certiorari action and thus considered no new evidence as to consistency.

The most recent Fourth District case involving consistency is *Gardens Country Club, Inc. v. Palm Beach County*,[262] which involved an attack on the county's decision to defer consideration of a planned

253. 559 So. 2d at 257.
254. *Id.* at 257-58.
255. *Id.* at 257.
256. *Id.* at 258.
257. The court's decision rested in part on its deference to the local government's interpretation of the plan's meaning, citing the well-established rule that "the construction of a statute by the agency charged with its enforcement and interpretation is entitled great weight and should be upheld unless clearly unauthorized or erroneus." *Id.* at 257 (citation omitted). The court had previously applied this principle to a local government's interpretation of its comprehensive plan. Alachua County v. Eagle's Nest Farms, Inc., 473 So. 2d 257 (Fla. 1st DCA 1985).
258. 547 So. 2d 690 (Fla. 4th DCA), *review dismissed,* 553 So. 2d 1164 (Fla. 1989).
259. *Id.* at 691.
260. 547 So. 2d at 694.
261. *Id.*
262. 590 So. 2d 488 (Fla. 4th DCA 1991).

unit development until after the adoption of its new plan. The district court upheld the county's decision, stating that the trial court did not have to reach the issues raised because the proposal was inconsistent with the 1980 plan in effect when the proposal was made.[263] The court announced that it was adopting the strict scrutiny approach established by the Third District in *Machado*, and it used the opportunity to review the trial record, evaluate the plaintiff's proposal against the 1980 plan, and find the proposal inconsistent with the plan.[264] As in *Southwest Ranches*[265] and *Allen Morris*,[266] the court found a way to permit a consistency review without a verified complaint.

The Fifth District Court is notable in its treatment of consistency between *Cape Canaveral v. Mosher*[267] and *Snyder v. Board of County Commissioners of Brevard County*,[268] in that its most important concepts have been found primarily in dissenting opinions by Judge Sharp. In *Battaglia Fruit Co. v. City of Maitland*,[269] for example, the court dismissed the city's petition for certiorari on consistency grounds because the city had not participated in the public hearing.[270] Judge Sharp dissented, stating that the trial court should have heard the case de novo.[271] Judge Sharp further maintained that, under the Planning Act, the court had the duty to ensure that the action was consistent with the plan as it otherwise would be void ultra vires,[272]

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263. *Id.* at 491.

264. *Id.* at 490. *See* Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1989).

265. Southwest Ranches Homeowners Ass'n v. County of Broward, 502 So. 2d 931 (Fla. 4th DCA 1987), *review denied*, 511 So. 2d 999 (Fla. 1987).

266. Palm Beach County v. Allen Morris Co., 547 So. 2d 690 (Fla. 4th DCA), *review dismissed*, 553 So. 2d 1164 (Fla. 1989).

267. 467 So. 2d 468 (Fla. 5th DCA 1985).

268. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991).

269. 530 So. 2d 940 (Fla. 5th DCA 1988).

270. *Id.* at 942. The majority held "the legislative act which gives Orange County its zoning powers specifically prohibits de novo court review," 530 So. 2d at 943. Not only does such a grant of certiorari review conflict with FLA. CONST. art. V, § 5, *see infra* note 320, but it also limits the right of affected persons to pursue de novo actions and may violate the open courts provision of art. I, § 21.

The problems faced by the city in obtaining effective review of zoning actions under certiorari standards are ample proof that the practice should be abolished on policy grounds, if not legal grounds. Public hearings, even after notice through publication, are insufficient forums for the protection of the rights of both the petitioner and parties which may be affected by the decisions reached.

271. 950 So. 2d at 946. Judge Sharp was addressing the need to establish standing. No mention of the need to file a verified complaint was made.

272. Judge Sharp cites Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1989), for this proposition, but *Machado* is citing Haar, *supra* note 35—an example of how the current treatment of consistency goes back to the roots of the idea.

and that the action should have been evaluated under a strict scrutiny standard.[273]

Similarly, Judge Sharp dissented in *St. Johns County v. Owings*,[274] where a circuit court reviewed consistency in the context of a certiorari appeal. The majority held that the trial court applied correct law by reciting the "fairly debatable" standard, with substantial competent evidence on the record to support its finding.[275] The court applied the standard of certiorari review of an appellate decision, as opposed to the appellate review of a decision after a de novo hearing, under the rules established by the Florida Supreme Court in *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*.[276] The court therefore determined that the issue of what standard to apply was the only issue before it.[277] Dissenting, Judge Sharp concluded that the trial judge had misapplied two essential elements of the law in that, on one hand, the county's interpretation of the plan policies in question were not given proper respect, and that, on the other hand, the court erred in holding that the "fairly debatable" standard applied to a consistency challenge.[278] Judge Sharp criticized the majority in *Educational Development Center* because the zoning body was not a lower tribunal capable of making a judgment that justified the deferential review given a trial court in a certiorari review.[279] By applying the "fairly debatable" test, the lower court stripped the plaintiffs of any effective judicial review.[280]

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273. 530 So. 2d at 951. Judge Sharp was obviously frustrated at the limits imposed on the consistency review by the certiorari posture of the case, but still found sufficient evidence in the record to support the view that the action was inconsistent as viewed under strict scrutiny. *Id.*

274. 554 So. 2d 535 (Fla. 5th DCA 1989).

275. *Id.* at 537.

276. 541 So. 2d 106 (Fla. 1989). *Education Dev. Center* engendered much concern among consistency advocates, as the limited review it grants appellate courts reviewing certiorari appeals of trial courts that heard certiorari appeals from quasi-judicial boards renders effective review impossible if the public hearing record is in any way deficient. *See* Richard Roddewig et al., *Recent Developments in Land Use, Planning and Zoning Law*, 22 URB. LAW. 719, 721-23 (1990).

277. 541 So. 2d at 107-08.

278. 554 So. 2d at 543. Judge Sharp maintained that "if a comprehensive plan . . . is capable of being interpreted in two or more different ways, it is error for a court not to give the zoning authorities' interpretation deference over its own view." *Id.* This is generally in accord with the First District's position in B.B. McCormick & Sons v. City of Jacksonville, 559 So. 2d 252 (Fla. 1st DCA 1990), but is inconsistent with the approach taken in *Machado*, 519 So. 2d 629 (Fla. 3d DCA 1987). In this type of situation, such an interpretation does not create post hoc rationalizations because the interpretations to which Judge Sharp refers were on the record at the public hearing.

279. 554 So. 2d at 544. Judge Sharp noted that "an agency or a zoning board is not a court," again highlighting the problems when a certiorari review is undertaken in a context where a broad range of law, rather than simple fact finding, might be implicated.

280. *See* Cherie Lee Onkst, Comment, *Ignoring the Appeal to Reason in the Appeal of*

The fourth notable dissent by Judge Sharp is in *Gilmore v. Hernando County*.[281] In *Gilmore*, the majority affirmed per curiam, a lower court's granting of summary judgment in a consistency challenge taken under section 163.3215, based on the "fairly debatable" standard.[282] Judge Sharp strongly disagreed with the affirmance, noting several debatable facts which bore on the issue of the consistency of the action, including the fact that the development was arguably inconsistent with the land use map designation.[283] Judge Sharp also criticized the use of the "fairly debatable" standard by the trial court, stating that it precluded effective review by placing the burden on the challenger, not the developer or the county.[284]

More recently, in *Splash & Ski, Inc. v. Orange County*,[285] the potential constitutional problem posed by special acts purporting to establish statutory standards for certiorari appeals was considered. *Splash & Ski* involved an appeal to a denial of a special exception. The zoning ordinance provided a ten day window period in which a letter of intent and a certiorari appeal were to be filed in order to appeal under the ordinance.[286] The court refused to apply the ordinance to limit the plaintiff's right to common law certiorari, nor to allow the notice of intent requirements to bind the plaintiffs, finding the requirement procedural in nature.[287] The court avoided ruling on the constitutionality of the statutory certiorari requirements themselves by dealing with the case under common law certiorari.[288]

C. *A New Era?* Snyder v. Board of County Commissioners of Brevard County *Revisited*

The evolution of the consistency doctrine is reflected primarily in the various holdings of *Snyder v. Board of County Commissioners of*

Right: Judicial Review of Administrative Action in Florida after Vaillant, 14 STETSON L. REV. 665 (1985), for a discussion of the problems of effective review of local agency action through certiorari.

281. 584 So. 2d 27 (Fla. 5th DCA 1991).

282. In this case, the plaintiffs actually followed the verified complaint requirements of the Planning Act, ch. 85-55, 1985 Fla. Laws 207 (current version at FLA. STAT. §163.3161 (1991)).

283. 584 So. 2d at 29.

284. *Id.* at 30-31. Judge Sharp thereby recognized that third party challengers may have great difficulty protecting interests that were ignored in the public hearing.

285. 17 Fla. L. Weekly 806 (Fla. 5th DCA March 27, 1992).

286. *Id.* The zoning ordinance was the same as the one at issue in Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940 (Fla. 5th DCA 1988), established by special act in 1965 and last amended in 1971. 17 Fla. L. Weekly at 808 n. 4.

287. *Id.* at 807-08. As a procedural requirement, the provision controverted article V, sec. 2(a), FLA. CONST. The court noted that this procedural trap had been used to nullify the claims of others. *Id.* at 808 n. 12. Presumably the decision will put an end to this trap for the unwary.

288. *Id.* at 808 n. 2. The court did, however, note the potential constitutional problem.

Brevard County.[289] As noted above, the *Snyder* court held that while the initial adoption of a zoning ordinance is a legislative act, the rezoning of individual parcels is quasi-judicial.[290] It thus requires procedural safeguards and a written record, and it is reviewable by writ of certiorari.[291] Further, the court held that a landowner requesting a rezoning must adduce evidence that the proposal is consistent with the plan.[292] Once this is accomplished the burden shifts to the local government to show that the proposal is either inconsistent with the plan or that a substantial community interest in the public health, safety, or welfare would be compromised by granting the rezoning.[293]

Moreover, the court held that rezonings are quasi-judicial[294] based on the rationale developed by Holman,[295] *Fasano*,[296] Peckinpaugh[297] and, to a lesser extent, *Machado*.[298] Characterizing the act of amending the zoning map as executive action, the court stated that

> [i]t has beecome clear that there are, or should be, two zoning maps, viz., a comprehensive future land use planning map, representing a legislative goal or ideal and a second zoning map that merely delineates the actual zoning as it presently exists. The latter map is merely a record of the original zoning . . . and is analogous to records . . . recording the result of judicial action by the courts.[299]

The court determined that the Planning Act's consistency requirement establishes the plan and the land development regulation as legislative acts, while "changes in zoning maps . . . are ministerial clerical recordings."[300] The court ignored Florida precedents as old as *Schauer v. City of Miami*[301] and as recent as *Jennings v. Dade County*,[302] which held that rezonings are legislative in nature.

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289. 595 So. 2d 65 (Fla. 5th DCA 1991).
290. *Id.* at 80.
291. *Id.* at 80-82.
292. *Id.*
293. *Id.*
294. *Id.* at 80.
295. Holman, *supra* note 102.
296. Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973).
297. Peckinpaugh, *supra* note 130.
298. Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1989).
299. *Snyder*, 595 So. 2d at 75 (citation omitted).
300. *Id.*
301. 112 So. 2d 838 (Fla. 1959) (holding that rezoning a specific parcel is a legislative act). The Fifth District interpreted the opinion as stating that the amendment of the zoning code, as

The court also viewed the imposition of quasi-judicial status on rezonings as necessary to protect the procedural and substantive due process rights of landowners.

> Effective judicial review, constitutional due process and other essential requirements of law, all necessitate that the governmental agency . . . applying legislated land use restrictions to particular parcels of privately owned lands, must state reasons for action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review . . . .[303]

To receive the rezoning at the initial hearing or on review, therefore, the landowner must show only that procedural requirements have been met and that the proposal is consistent with the comprehensive plan.[304] In holding that the constitution demands the granting of a consistent rezoning petition, the court failed to examine the provisions of the Planning Act that would have achieved the same results.[305]

The court also ignored the existence of the Planning Act's provision for an original hearing to review consistency issues, as well as its procedural requirements. *Snyder* was an appeal from the circuit court's denial of a writ of certiorari to review the county's decision. The district court quashed the circuit court's order denying the writ,[306] thereby ordering the lower court to take a case in which a legislatively mandated condition precedent to maintaining a consistency action had not been met.[307]

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opposed to the map, is a legislative act. *Snyder*, 595 So. 2d at 79. This ignores the fact that *Schauer* involved a map amendment.

302. 589 So. 2d 1337 (Fla. 3d DCA 1991) (Ferguson, J., concurring). Judge Ferguson noted that "[i]t is settled that the enactment and amending of zoning ordinances is a legislative function—by case law, Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959); Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987) (en banc), *review denied*, 529 So. 2d 694 (Fla. 1988); by statute, sections 163.3161 and 166.041, *Florida Statutes* (1989); and by ordinance, Dade County Code § 35-803." *Id.* at 1349.

303. *Snyder*, 595 So. 2d at 81.

304. *Id.*

305. *See supra* notes 169, 209 and accompanying text.

306. 595 So. 2d at 82.

307. The filing of a verified complaint is a clear requirement of section 163.3215, *Florida Statutes* (1991), which must be met prior to filing a challenge to a development order on the grounds of inconsistency with the comprehensive plan. Leon County v. Parker, 566 So. 2d 1315 (Fla. 1st DCA 1990); *see also supra* note 179 and accompanying text.

Additionally, permitting rezonings to be reviewed by certiorari in the circuit court is arguably a violation of the uniform jurisdiction provisions of FLA. CONST. art. V, § 5, as well as Fla. R. App. P. 9.030(c), which permits direct review of the decisions of "lower tribunals." *See infra* note 327 and Part VI-A-5 for further analysis.

VI. BRINGING CONSISTENCY TO THE CONSISTENCY DOCTRINE

The successful adoption of the consistency requirement in Florida demands that local government actions be reviewed in a consistent, understandable fashion that treats all relevant interests fairly. The current confusion in the district courts precludes effective review because parties cannot determine whether to attack a rezoning through certiorari, a verified complaint, or both.[308] Similarly, the issue of whether a consistency challenge is to be heard as an original action or based on the record affects the rights of potential petitioners, whether landowners or neighbors, by changing the burden they would have to meet before the local board. These problems are compounded because the district courts apparently have not thoroughly examined the provisions of the Local Government Comprehensive Planning and Land Development Regulation Act (Planning Act) and other doctrines of state law in adjudicating consistency issues. If the district courts are not going to address the legal problems that have been created, then the Florida Supreme Court or the Legislature must do so.

A. Suggestions for the Courts

The district courts of appeal are divided on many issues relating to how zoning issues under the Planning Act are to be reviewed. The *Snyder*[309] court, by taking a position beyond that of the other district courts of appeal, has highlighted these differences. Many of the positions taken by the courts have been insufficiently grounded in the terms and requirements of the Planning Act, and have been based instead on doctrines developed in other states under state planning and zoning frameworks significantly different from Florida's. The suggestions that follow could clarify the issues facing the courts, local governments, landowners and concerned citizens as they approach the implementation of the consistency doctrine.[310]

1. Consistency reviews are original actions under the terms of the Planning Act

The Planning Act's provision for a challenge in circuit court[311] clearly indicates that the action is original rather than part of a

308. This problem is critical because the time requirements for the verified complaint and certiorari review are mutually exclusive. Under § 163.3215, the petitioner must wait for 30 days for the local government to respond to the verified complaint, while under FLA. R. APP. P 9.110(b), the notice of appeal must be filed within 30 days of the order appealed.

309. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991).

310. While this article focuses on consistency issues surrounding rezoning actions, these suggestions apply generally to consistency challenges to any type of development order.

311. FLA. STAT. § 163.3215 (1991).

scheme under which rezonings are quasi-judicial with review by certiorari.[312] The Legislature's use of the word "challenge" rather than "appeal" clearly means that a new cause of action is created by the statute.[313] If the Legislature had intended an appellate review, it could have provided explicitly for such. The Legislature has done so in other areas.[314] Furthermore, the provision in section 163.3215(1), *Florida Statutes* (1991), for injunctive or other relief is consistent with an original action rather than an appellate review. The conclusion to be drawn is that the Legislature provided a new cause of action for addressing the narrow issue of the consistency of development orders with comprehensive plans.[315]

2. *Courts should base their decisions on the evidence before them rather than solely on the record below*

Because consistency actions are original, new evidence may be presented at trial. This is necessary to permit the proper review of issues raised by parties who might be affected for the purposes of section 163.3215, but who did not participate in the public hearing. Any consistency issue raised in the verified complaint should be tried unless it can be disposed of by summary judgment.

While a verbatim record and findings of fact cannot be required of the local government acting legislatively,[316] the record of the proceedings below, if one exists, should be considered. The local government's interpretation of its regulation should be given the same deference as any agency's interpretation of its own rules, as long as the interpretation is supported by the plain meaning of the language[317] or, if an interpretation of fact, on the existence of substantial compe-

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312. *See supra* note 176 and accompanying text.

313. FLA. STAT. § 163.3161 (1991).

314. *See* section 333.11, *Florida Statutes* (1991), for an example of the Legislature providing certiorari review for a governing board action concerning disputes over airport zoning.

315. It would be inappropriate to allow parties to raise constitutional or procedural issues in an original action under section 163.3215.

316. Requiring local governments to provide a written record for review, the approach taken in Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1989), has little legal support outside *Fasano*, 507 P.2d 23 (Or. 1973), and the aforementioned articles, *supra* notes 39, 55, 107, and 130. While such interference with local government operating procedures may be appropriate in states that do not ascribe to the home rule, such a requirement is inconsistent with home rule philosophies. Under home rule, the local government has the authority to determine its own law, both substantive and procedural, unless it conflicts with constitutional or statutory provisions. *See, e.g.*, City of Daytona Beach Shores v. State, 454 So. 2d 651 (Fla. 5th DCA 1985) (municipalities enjoy the powers permitted to the state or its political subdivisions unless expressly proscribed).

317. *See supra* notes 257, 278 and accompanying text; *see also* note 266.

tent evidence to support the existence of the fact.[318] If a particular interpretation or finding does not appear on the record, new evidence must be produced and all evidence should be given equal consideration by the court. This approach is consistent with the Planning Act and general rules of interpretation while avoiding the problems of post hoc rationalizations.

3. *The burden of proof is on the plaintiff*

A development order is any action granting or denying a petition, and all development orders must be consistent with the plan or be found void ultra vires.[319] In light of this requirement, inconsistent actions are outside the local government's authority. As with any challenge to the validity of a government act, the rezoning should be presumed valid unless the court is shown evidence to the contrary. Therefore, the plaintiff has the burden of proof, rather than the landowner who sought the change, and the local government is the defendant.[320] If the evidence indicates that the action was inconsistent, the action is invalidated. If a successful challenge is made against the denial of a rezoning, the rezoning should be granted because there is no legal basis, other than a plan amendment, for denying it.[321]

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318. See Judge Sharp's dissent in St. Johns County v. Owings, 554 So. 2d 535, 543 (Fla. 5th DCA 1989). There is no inconsistency in giving legislatively made findings the deference given agency findings, and then holding them up to the comprehensive plan on a strict scrutiny basis. *See supra* note 229 and accompanying text.

319. *See supra* note 163 and accompanying text.

320. The Third District, in *Machado*, held that the burden was on the landowner, citing Fasano v. Board of County Commissioners, 507 P. 2d 23 (Or. 1973). The *Fasano* court's holding, however, was based on Oregon courts' construction of the Oregon zoning enabling act. *Id.* at 26. Nothing in the Florida framework suggests that the landowner should bear any particular burden, except as the petitioner. If the landowner is the plaintiff the burden follows, but not under the *Fasano* logic, rehashed in *Machado*, that the burden rests with the landowner because she is in a position to benefit from the decision. *See, e.g.*, Balino v. Department of Health and Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977) (general rule, absent statute, is that burden is on party asserting the affirmative).

321. Courts have been hesitant to order rezonings because of separation of powers concerns. *See* Lee County v. Morales, 557 So. 2d 652 (Fla. 2d DCA 1990). The oft expressed phrase is that courts "will not sit as a super-zoning board." *Id. See also* Burrit v. Harris, 172 So. 2d 820 (Fla. 1965). Courts do not have the same reticence when asked to invalidate a rezoning. *See* Cape Canaveral v. Mosher, 467 So. 2d 468 (Fla. 5th DCA 1985).

While the result suggested here would require courts to compel the amendment of zoning maps, the Legislature has authorized the courts to do so. First, the courts are directed by section 163.3194(4)(b), *Florida Statutes*, to construe the statute broadly to accomplish its purposes. Second, the courts are authorized under section 163.3215 to offer injunctive relief in order to prevent action on a development order that is inconsistent with the local plan. Under these provisions, the courts have both the authority and the duty to order zoning changes that are consistent with the plan, as well as to invalidate inconsistent rezonings which have been granted.

4. The standard of review is found in the language of section 163.3194

When a local government's action is challenged as being outside its authority, the nature of the action is similar to that of a constitutional challenge to a statute.[322] The issue is whether the action conforms to the written standards of the local comprehensive plan, and so the plan's objectives and policies should be construed in the same manner as any legislative enactment.[323] From that point, the standard of review is clear from the terms of section 163.3194(4): the court is to consider the meaning of the plan, the densities, intensities and other aspects of the proposed development order, and determine whether the development order furthers and is compatible with the plan policies in question. This standard, more strict than the "fairly debatable" test, is similar to the "strict scrutiny" test Judge Cowart described in *Cape Canaveral v. Mosher*.[324] The court took this approach in *B.B. McCormick & Sons v. City of Jacksonville*,[325] but failed to discuss the application of the "compatible with and furthers" language of the Planning Act.[326]

5. The courts should divorce consistency review from the issue of whether rezoning is quasi-judicial

A major problem with the recent treatment of consistency has been the acceptance of rezonings by writ of certiorari in the circuit courts. Examining rezonings under standards of appellate review creates these problems because the hearings themselves are conducted as legislative proceedings with few of the limited procedural protections that surround quasi-judicial proceedings. While some courts apparently accept certiorari review of zoning issues under special acts which originally established particular zoning ordinances,[327] this is invalid. Article V, sections 5(b) and 6(b) of the *Florida Constitution*, author-

322. *Cf.* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (challenge to county's authority under home rule charter is similar to a constitutional challenge).

323. Some commentators have expressed concern that no development could be consistent with all of the policies and objectives of a comprehensive plan under a *Machado* strict scrutiny analysis. *See* Helfman & McDowell, *supra* note 231. This concern would be alleviated by using the "compatible with and furthers" language of the act, as many objectives and policies would not be applicable, while others would not be adversely affected by any given decision. See also *supra* note 167 for tenets of statutory construction which could be used to avoid unreasonable results.

324. 467 So. 2d 468 (Fla. 5th DCA 1985).

325. 559 So. 2d 252 (Fla. 1st DCA 1990).

326. FLA. STAT. § 163.3194(3) (1991).

327. *See* LaCroix, *supra* note 90, at 107.

izes uniform jurisdiction in the county and circuit courts of the state.[328] There is no general law granting the county, circuit, or district courts appellate jurisdiction over rezoning actions. Furthermore, under the logic of *Birdsong Motors v. City of Tampa*,[329] certiorari provisions of zoning laws enacted by any special act adopted prior to the amended article V are invalid. Therefore, review by certiorari is currently legal only if the action involved is quasi-judicial in nature.[330] Furthermore, nothing in the Planning Act indicates a clear Legislative intent to make rezoning actions quasi-judicial.[331]

The courts, until *Snyder*, have refrained from an in-depth examination of the issues surrounding whether rezonings remain legislative acts. The courts should now undertake such an examination, focusing on the extent and meaning of the consistency doctrine. If it is determined, as is suggested above, that the implementation of consistency demands that a rezoning consistent with the plan be approved, then under the logic of Florida case law dealing with special exceptions and subdivisions, rezonings are executive. In that case, due to the require-

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328. LaCroix, *supra* note 90, argues that FLA. R. APP. P. 9.030(c)(1) authorizes circuit courts to hear review of administrative decisions, if authorized by special laws. *Id.* at 106. This is an inaccurate reflection of the law.

The rules of appellate procedure may not grant the courts more authority than they possess under the Constitution. Article V, section 5 of the *Florida Constitution* provides that circuit courts shall have uniform jurisdiction throughout the state. *In re* Guardianship of Bentley, 342 So. 2d 1045 (Fla. 4th DCA 1977). Special acts cannot grant jurisdiction in the circuit courts. Board of County Comm'rs of Hillsborough County v. Casa Dev. Ltd., 332 So. 2d 651 (Fla. 2d DCA 1976). Neither may local ordinances confer jurisdiction on the circuit court. Cherokee Crushed Stone v. City of Miramar, 421 So. 2d 684 (Fla. 4th DCA 1982). Zoning provisions adopted by ordinance or special act which permit certiorari review therefore conflict with Article V, section 5, and FLA. R. APP. P. 9.030(c)(1), and thus should not be enforced by the courts. *See also* Brinson v. Tharin, 127 So. 313 (Fla. 1930) (legislature cannot regulate or extend the court's power to issue writs of common law certiorari). No general law conferring appellate jurisdiction over general zoning actions exists, although section 333.11, *Florida Statutes* (1991) provides for certiorari appeal of actions of boards or agencies implementing special provisions for airport zoning provided by chapter 333.

329. 261 So. 2d 1 (Fla. 1972).

330. No general law granting an appeal of local government actions to the circuit court exists. Under FLA. R. APP. P. 9.030(c)(1), such a review would be an appeal by right rather than a discretionary review by certiorari. In the absence of statutory authorization, circuit courts take these appeals as writs of common law certiorari under FLA. R. APP. P. 9.030(c)(3). *See, e.g.*, Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940 (Fla. 5th DCA 1988).

331. See *supra* notes 203, 328 for a discussion of the application of certiorari review and why it is illegal as applied to legislative rezoning actions.

Even if legal, certiorari review of rezonings is bad policy because the type of record typically produced at a public hearing will not provide the type of evidence needed to support an equal protection or procedural due process challenge. This results either in a denial of protection or an unnecessary and complicated collateral attack. See Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991), for a perfect example of this problem. As Judge Sharp noted in her dissent in St. Johns County v. Owings, 554 So. 2d 535, 544 (Fla. 5th DCA 1990), these kinds of proceedings simply cannot produce the kind of record that a court produces.

ment that notice be given and hearings held, rezonings are quasi-judicial in nature.

In examining the status of rezoning decisions, the courts should eschew the arguments of *Fasano*,[332] the *Ohio State Law Review* comment,[333] and the *Florida State University Law Review* comment[334] as authority for the proposition that rezonings are per se quasi-judicial. These authorities base their view of quasi-judicial action on the scope and subject of the decision rather than on the essential issue of the framework of authority in which the decision is made. In addition, their logic is based largely on expeditiously limiting the discretion of local governments without regard to the other policy issues involved.

The courts, in considering whether to declare rezoning actions as quasi-judicial, also should consider the home rule status of local governments in Florida,[335] as well as the fact that the Planning Act's definition of a land development regulation includes rezoning. The existence of home rule under the constitution and various home rule statutes requires that deference be given to local governments' choices in arranging their legislative affairs.[336] Similarly, the inclusion of rezonings as land development regulations indicates a belief on the Legislature's part that these actions are a form of local legislation.[337] Unless the structure of authority under the local comprehensive plan and general zoning ordinance provides that rezonings or map amendments are executive,[338] the courts should be hesitant to declare that they are per se quasi-judicial in nature.

B. Suggestions for the Legislature

Some of the blame for the inconsistency in the application of the consistency doctrine can be laid at the door of the courts. Several aspects of the existing statutory framework, however, expand the poten-

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332. Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973).

333. Holman, *supra* note 107.

334. Peckinpaugh, *supra* note 130.

335. Local governments have home rule under Article VII, sections 1 and 2 of the *Florida Constitution* and under chapters 125 (counties) and 166 (municipalities), *Florida Statutes*. *See also* Speer v. Olson, 367 So. 2d 207 (Fla. 1978) (construing provisions of chapter 125 as giving home rule powers to charter and non-charter counties), City of Miami Beach v. Forte Towers, 305 So. 2d 764 (Fla. 1975) (construing Florida Constitution and chapter 166 as giving home rule powers to municipalities).

336. City of Daytona Beach Shores v. State, 454 So. 2d 651 (Fla. 5th DCA 1985).

337. See *supra* notes 154-55 and accompanying text for a discussion of legislative deference to local authority in the Planning Act. It also should be noted that rezonings are subjected to special hearing and notice requirements. *See* FLA. STAT. § 163.125.66(5) (1991) (counties), § 166.041(3)(c) (1991) (municipalities).

338. *See supra* note 331.

tial for conflict. The following suggestions addressing these problems would aid the courts, local governments, landowners and citizens in effectively implementing the consistency doctrine.

1. Zoning map amendments or adoptions should be made executive actions

While the judicial determination that rezonings are quasi-judicial may be unjustified for the reasons discussed above, the functional analysis undertaken by the *Snyder* court demonstrates that such actions have all the characteristics of otherwise executive activities. In addition, the effective implementation of the Planning Act requires that the densities achieved under the local plans correspond to the planned densities.[339] Local governments therefore should be required to grant rezoning requests that are consistent with the plan. Rezonings then would be treated as administrative functions.[340]

The Legislature should clearly identify these actions with executive actions by removing "zoning" and "rezonings" from the definition of land development regulations and development orders and by defining the adoption or amendment of a zoning map as a development order. Furthermore, the Legislature should state clearly that the comprehensive plan and land development regulations are to be considered legislative acts of local governments while all other actions taken in implementing comprehensive plans are to be considered executive actions. These steps will greatly clarify the proper status of rezoning actions.

2. The Legislature should prescribe procedural safeguards while maintaining local government flexibility

It is clear that the common law procedural requirements placed on quasi-judicial actions of local administrative boards are insufficient to guarantee a fair review and are therefore inadequate to guarantee procedural due process.[341] Local governments are currently exempt from the procedural requirements of the Florida Administrative Procedures

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339. *See supra* notes 199, 209, 215 and accompanying text.

340. By declaring rezonings to be executive actions, the Legislature would put to rest the nagging problem of rezoning by referendum, which was permitted in Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983). *See also* Charlotte Ford Hubbard, Comment, *Questioning the Florida Rule on Rezoning Single Parcels of Land by Referendum*, 4 J. LAND USE & ENVTL. L. 121 (1988). This practice is the ultimate expression of "trial by neighborism" and should be abolished.

341. *See* St. Johns County v. Owings, 554 So. 2d 535 (Fla. 5th DCA 1989) (Sharp, J., dissenting); Onkst, *supra* note 270.

Act (APA) unless otherwise provided by general law.[342] One obvious step in bringing procedural fairness to the implementation of comprehensive plans would be to place the issuance of development orders under the provisions of the APA.[343]

Though it is clear that local government administrative action is the source of many conflicts, the administrative adjudication measures provided by the APA may be inappropriate and overly burdensome for application by local governments. This conclusion does not call for abandoning the idea of additional procedural protections, but rather for developing a more tailored approach. If boards involved in administering land development regulations, including local governing bodies, are not brought under the APA, then a mini-APA specifically designed for such decisions should be developed.[344] Such an act would include provisions for the use of local hearing officers or special masters,[345] as well as a set of minimum criteria for record building, notice, evidence, and procedure.[346] A mini-APA would also provide that orig-

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342. FLA. STAT. § 120.52(c) (1991).

343. This is not a new proposition. The reporter's comments for the Administrative Procedures Act indicate that, while not justified at the time, future application of the Act to local governments was considered.

> The approach of the proposed act will allow selective inclusion [of local governments] after an opportunity for legislative analysis and debate *or after a court determination that minimum fairness is not being accorded by local agencies.*

ARTHUR ENGLAND & HAROLD LEVINSON, 3 FLA. ADMIN. PRACTICE 9 (Supp. 1991).

The rezoning cases cited here indicate that the courts believe that fairness is not being provided. Perhaps more prophetic for the debate discussed in this article is the reporter's comment on the definition of "agency action."

> [T]he provisions of the proposed act will make possible the abolition of all forms of judicial distinction which have been developed relative to agency actions, such as "quasi-executive," "quasi-judicial," "quasi-legislative," and, more recently, "more judicial than quasi-judicial." . . . The new act would save the court . . . the torturous development and application of such terms . . . .

Id. at 10 (citations omitted).

344. Nor is this a new or radical suggestion. In 1965, in a review of state efforts at developing administrative law sponsored by the American Bar Association, Frank Cooper recognized that

> [a] need exists for legislation prescribing procedural standards for . . . municipal and county agencies. In view of the particular problems and limitations they encounter . . . it is generally thought that it would be impracticable to make them conform to all the formal procedures required of state agencies. . . . But it would serve the public interest to provide a simplified procedural code for all municipal and county agencies exercising rulemaking or adjudicatory powers, and providing a uniform method of judicial review.

1 FRANK COOPER, STATE ADMINISTRATIVE LAW 97-98 (1965).

345. For a discussion of Hillsborough County's experience with hearing officers, see Richard Beumbach & Donald Cooper, *Improving the Quality of Zoning Administration through the Use of Hearing Examiners*, *in* GROWTH MANAGEMENT INNOVATIONS IN FLORIDA (Westi Jo deHaven-Smith ed., 1988).

346. See, *e.g.*, OR. REV. STAT. ANN. § 197.763 (1989), which provides procedures for the

inal appeals from the hearings taken under its provisons are to the circuit courts, not to bodies composed of elected or appointed officials. Such an approach is the only way to address the concerns about procedure expressed by the authors emphasized in this article, the courts in *Fasano*, *Machado*, and *Snyder*, and the dissenting opinions of Judge Sharp.

C. *Conclusion*

The consistency doctrine has gotten off track in Florida. Misdirection has occurred through the judicial adoption of theories and precedents imported from other states' case law and statutes, and not from the language of Florida's Planning Act. Judicial correction is necessary if the consistency requirement is to accomplish its goals both for the quality of the state's communities and the protection of individual rights. The Legislature bears partial responsibility for the current state of affairs because of the ambiguity in the Planning Act's definitions relating to rezonings or map amendments, as well as the lack of clear procedural guidelines for local administrative actions. These failures should be addressed as quickly as possible, and the adoption of some form of substantial procedural requirements should accompany that reform. If these actions are taken, consistency can be restored to Florida's consistency requirement.

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conduct of quasi-judicial land use hearings before local boards or administrative hearing officers. The statute requires specificity, at the hearing, of the issues to be raised on appeal, *id.* § 197.763(1); notice of the hearing, including the criteria by which the application will be evaluated, *id.* § 197.763(2); that testimony at the hearing must be directed toward the specified criteria upon which the decision must be based, *id.* § 197.763(3); and that the hearing must be re-opened in order to allow parties to respond to evidence presented at the hearing, if a party so requests, *id.* § 197.763(4).